DOCKET

No. 86-7059-CSY
Status: GRANTED

Title: Tyrone Patterson, Petitioner
v.
Illinois

Docketed:
June 12, 1987

Court: Supreme Court of Illinois

Counsel for petitioner: Honchell,Donald S.

Counsel for respondent: Donatelli,Jack

Entry	Date	Note	Proceedings and Orders
1	Jun 12 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Jun 29 1987		Brief of respondent Illinois in opposition filed.
4	Jul 1 1987		DISTRIBUTED. September 28, 1987
6	Oct 2 1987		REDISTRIBUTED. October 9, 1987
8	Oct 13 1987		Petition GRANTED.
			**********
10	Nov 5 1987		Order extending time to file brief of petitioner on the merits until December 11, 1987.
11	Nov 12 1987		Joint appendix filed.
13	Dec 3 1987		Brief of petitioner Tyrone Patterson filed.
14	Dec 21 1987		Record filed.
		*	Certified original record, 3 volumes, received.
24	Dec 24 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Jan 4 1988		Order extending time to file brief of respondent on the merits until January 25, 1988.
18	Jan 8 1988		Brief amici curiae of Americans for Effective Law Enforcement, Inc., et al. filed.
17	Jan 11 1988		Brief amicus curiae of Washington Legal Foundation filed.
19	Jan 25 1988		Brief amicus curiae of United States filed.
20	Jan 25 1988		Brief of respondent Illinois filed.
22	Feb 5 1988		SET FOR ARGUMENT, Tuesday, March 22, 1988. (2nd case).
23	Feb 10 1988		CIRCULATED.
25	Feb 22 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
26	Feb 23 1988	X	Reply brief of petitioner Tyrone Patterson filed.
27	Mar 22 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-7059

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TYRONE PATTERSON,

Petitioner

vs

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Counsel for Petitioner

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Assistant Public Defender,

Of Counsel

No.

IN THE

SUPREME COURT OF THE UNITED STATES

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TYRONE PATTERSON,

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vs

THE PEOPLE OF THE
STATE OF ILLINOIS,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

Petitioner Tyrone Patterson respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Illinois affirming his murder conviction and sentence of 24 years in prison.

(a)

QUESTION PRESENTED FOR REVIEW

The question for review is whether mere admonishments under Miranda v. Arizona are sufficient to assure that an indicted defendant knowingly and intelligently waives his Sixth Amendment right to the assistance of counsel at interrogations following that indictment.

(b)

LIST OF PARTIES TO THE PROCEEDINGS
IN THE SUPREME COURT OF ILLINOIS

The following parties appeared in the proceedings in the Supreme Court of Illinois involving petitioner Patterson:

1. Petitioner: Tyrone Patterson

   Counsel: Paul P. Biebel, Jr.
   Public Defender of Cook County
   403 Richard J. Daley Center
   Chicago, Illinois 60602

2. Codefendant: David Thomas

   Counsel: Steven Clark
   Deputy Defender
   Office of State Appellate Defender
   100 W. Randolph St.
   Suite 5-900
   Chicago, Illinois 60601

3. Respondent: People of the State of Illinois

   Counsel: Richard M. Daley
   State's Attorney of Cook County
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OPINION BELOW

The decision of the Illinois Supreme Court involving petitioner Patterson is to be published as People v. David Thomas at - Ill.2d -, - N.E.2d - (1987). A copy of the opinion is included as an appendix to this petition.

(f)

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3). The opinion of the Supreme Court of Illinois was filed on April 16, 1987. No petition for rehearing was submitted. This petition is being presented within 60 days of the date of the Supreme Court's ruling.

(g)

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(h)

STATEMENT OF THE CASE

Petitioner Patterson was arrested on August 21, 1983 on a warrant for battery and mob action in a case unrelated to the incident for which he was later tried. He was thereupon taken to a police station in Evanston, Illinois. (R. 4-5) When there questioned about a homicide police were investigating, petitioner replied he knew nothing about it. (R. 12, 33, 36) Petitioner thereafter remained in custody in the police station lockup (R. 13-14, 20) and on August 23, 1983 he was indicted (along with others) for murder and armed violence. (R. 19)

In the police station, Evanston police officer Michael Gresham met with petitioner after Gresham's appearance before the grand jury. (R. 20) At that time, Gresham told petitioner of the indictment (R. 20, 51-2, 53), prompting petitioner to ask who had been charged. Gresham told him the names and petitioner responded by inquiring why Carl Harmon had not been indicted since Harmon had done everything and had made a statement to a girl. (R. 20-1, 54, 55, 56) Gresham then stopped petitioner from speaking further and advised him of his rights, using the admonitions contained in the case of Miranda v. Arizona. (R. 21-2, 58-60) After securing a written waiver of those rights (R. 21-2, 58-60), Gresham then directed petitioner to continue speaking and the two conversed for 30 or 40 minutes. (R. 23) In this session, petitioner revealed how the victim was killed. (R. 732-4)

Later that same day, officer Gresham notified the Cook County State's Attorney's Office and assistant George Smith arrived at the police station. (R. 23) He spoke with petitioner (R. 24), knowing that petitioner had by then been charged in a grand jury indictment. (R. 80-1) Smith showed petitioner a waiver form by which to surrender constitutional rights. Petitioner recognized it as containing his signature and initials (R. 74-5, 83-4) and declared he understood those constitutional rights. (R. 75, 83-4) Smith explained his function as an assistant State's Attorney and asked petitioner if he desired to make a statement. Petitioner agreed. (R. 76) So, he detailed the events leading to the victim's murder. (R. 800-13)

Prior to trial, petitioner moved to suppress his statements and a hearing was held on their admissibility. There, the judge ruled the statements were admissible in evidence. (R. 168-9) So, the State used petitioner's disclosures to both officer Gresham and assistant State's Attorney Smith at trial to prove petitioner's guilt. (R. 732-4, 800-13)

On review, the Illinois Supreme Court approved the admission of the statements, holding petitioner had effectively waived his Sixth Amendment right to counsel. (Op., pp. 6-7) The court recognized the right to counsel under the Sixth Amendment was "separate and distinct" from the right to counsel under the Fifth Amendment (Op. at p. 5) but deemed the waiver of Sixth Amendment counsel valid

because petitioner "was aware of the gravity of his situation" (Op. at pp. 6, 7) and "understood his constitutional rights". (Op. at p. 7) That court further acknowledged lower courts were "not in agreement" on "whether waiver of the sixth amendment right to counsel must be judged by a higher standard than that which is applicable to waivers of the right to counsel under Miranda" and that this Court had "reserved ruling on this question". (Op., p. 6)

Based on its interpretation of the law regarding waiver of the Sixth Amendment right to counsel, the Illinois Supreme Court accepted Miranda admonishments as sufficient to secure a knowing and intelligent waiver of that right. So, it affirmed petitioner's conviction based on the use of his confessions to authorities. (Op. at p. 10)

(1)

RAISING THE FEDERAL CONSTITUTIONAL CLAIMS

Petitioner argued in both the Illinois appellate court (see People v. Patterson, 140 Ill.App.3d 421, 424-5, 488 N.E.2d 1283 (1986)) and the Illinois Supreme Court that his waiver of counsel was ineffective under the Sixth and Fourteenth Amendments. The Illinois Supreme Court particularly considered if the information sufficed to permit a knowing and intelligent waiver of petitioner's

"sixth amendment right to counsel" (Op., p. 5) and specifically concluded petitioner "knowingly and intelligently waived his sixth amendment right to counsel." (Op., p. 7)

(J)

REASONS FOR GRANTING THE WRIT

MERE ADMONISHMENTS UNDER Miranda v. Arizona, DESIGNED TO PROTECT A SUSPECT'S FIFTH AMENDMENT RIGHTS, ARE NOT SUFFICIENT TO ASSURE THAT A CHARGED DEFENDANT AWARE OF HIS INDICTMENT KNOWINGLY AND INTELLIGENTLY WAIVES HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL AT INTERROGATIONS FOLLOWING HIS INDICTMENT

This Court, on two occasions, has confronted the question of whether a charged defendant has properly waived his Sixth Amendment right to counsel. (Brewer v. Williams, 430 U.S. 387, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977); Michigan v. Jackson, 475 U.S. -, 89 L.Ed.2d 631, 106 S.Ct. - (1986)) On each such occasion, this Court has resolved the issue without deciding the question of how a State may secure a valid waiver of that federal constitutional right.

Thus, in Brewer, this Court refrained from holding the accused could not have waived his Sixth Amendment right to counsel and decided simply he did not do so. (Brewer v. Williams, 51 L.Ed.2d 424 at 441) And in Jackson, this Court applied its holding in Edwards v. Arizona, 451 U.S. 477, 68 L.Ed.2d 378, 101 S.Ct. 1880 (1981) to find no surrender of the right to counsel, electing not to "decide...the general relationship between

Fifth and Sixth Amendment waivers." (Michigan v. Jackson, 89 L.Ed.2d 631 at 642 n. 10) In this case, unlike Brewer and Jackson, petitioner did waive his right to counsel. Therefore, the question unreached in those cases is clearly presented here: how the government may validly secure an effective waiver, knowingly and intelligently, of the indicted accused's Sixth Amendment right to counsel, binding on States through the Fourteenth Amendment. This critical question of federal law, twice undecided by this Court, should now be settled.

This Court has often recognized the crucial nature of the Sixth Amendment right to counsel in pretrial settings after the initiation of adversary criminal proceedings. In Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964), this Court recognized that, as much as at trial, an indicted accused needed counsel during police interrogations, "the only stage when legal aid and advice would help him." (12 L.Ed.2d at 249) In fact, this Court has expanded the applicability of the Sixth Amendment right to counsel beyond the trial itself to events prior to trial deemed critical to the accused:

> "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor. Later developments have led this Court to recognize that 'Assistance' would be less than meaningful if it were limited to the formal trial itself.

> "This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system or by his expert adversary or by both." (United States v. Ash, 413 U.S. 300, 37 L.Ed.2d 619, 626-7, 93 S.Ct. 2568 (1973))

Counsel has there been deemed crucial because events at these critical pretrial proceedings "might well settle the accused's fate and reduce the trial itself to a mere formality". (Ash, 37 L.Ed.2d 619 at 627; see also Maine v. Moulton, 47- U.S. -, 88 L.Ed.2d 481, 492, 106 S.Ct. - (1985); United States v. Gouveia, 467 U.S. 180, 81 L.Ed.2d 146, 155, 104 S.Ct. 2292 (1984)) Consequently, the accused is specifically accorded the right to counsel at interrogations after indictment and prior to trial (Massiah v. United States, 12 L.Ed.2d 246; Brewer v. Williams, 51 L.Ed.2d 42-) since, clearly, results of those interrogations may certainly settle the fate of the defendant and reduce the trial to pure formality. This Court must thus recognize anew that the issue arising here of petitioner's Sixth Amendment right to counsel at the interrogations after his indictment involved a highly significant constitutional concern. Yet the issue is not one commonly confronting this Court - denial of counsel - but an issue equally important - waiver of counsel.

This Court has previously considered the subject of a constitutionally adequate waiver of rights. It has

recognized the presumption against the waiver of fundamental constitutional guarantees (Michigan v. Jackson, 89 L.Ed.2d 631, 640 citing Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938)) and required a showing by the State, even in "an alleged waiver of the right to counsel...at a critical stage of pretrial proceedings", of the surrender of "a known right or privilege". (Brewer v. Williams, 51 L.Ed.2d 424, 439, 440 equally citing Johnson v. Zerbst) Thus, it realizes as a matter of federal constitutional law the heavy burden on a government seeking to show an adequate relinquishment of a "known" protection.

This case combines both the crucial concerns previously addressed separately by this Court: recognition of the critical Sixth Amendment right to counsel and acknowledgment of the heavy responsibility for proving waiver of significant constitutional rights. It is thus appropriate this Court now examine these matters when they arise together and decide how the State may secure a knowing and intelligent waiver of the Sixth Amendment right to counsel at post-indictment interrogations.

Courts of review are now uncertain on the applicable procedure for compliance with the test for waiver established by this Court. In Murphy v. Holland, 776 F.2d 470 (4th Cir. 1985), differing approaches by the various federal circuit courts of review were acknowledged because "courts have been unable to agree regarding what specific

warnings must be given the accused before a knowing and intelligent waiver of the sixth amendment right to counsel may be found." (776 F.2d at 481; emphasis by the court) Moreover, decisions of State reviewing courts are likewise in disagreement. (Compare Deputy v. State, 500 A.2d 581, 591 n. 14 (Del. 1985) (waiver of Sixth Amendment right to counsel more difficult to prove than waiver of Fifth Amendment right to counsel) with the holding in petitioner's case (waiver of his Sixth Amendment right to counsel satisfied by Miranda warnings established for waiver of Fifth Amendment right to counsel).) This Court must now provide guidance on the acceptable method of securing from an indicted accused a knowing and intelligent waiver of his Sixth Amendment counsel.

In previous cases, this Court determined there had been no surrender of the right to counsel and, so, did not examine the validity of the waiver. (Brewer v. Williams; Michigan v. Jackson) Here, petitioner did relinquish his right to counsel at his post-indictment interrogations but was it done knowingly and intelligently? To answer that critical question and provide needed direction for all, this Court should now accept this case and review the undecided issue of the proper method of securing a knowing and intelligent waiver of an indicted defendant's Sixth Amendment right to counsel.

(k)

CONCLUSION

For the reasons stated herein, petitioner Tyrone Patterson respectfully prays that this Honorable Court issue a writ of certiorari to review the judgment concerning him entered in these proceedings by the Illinois Supreme Court.

Respectfully submitted,

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APPENDIX

Docket Nos. 63144, 63149 cons.—Agenda 2—January 1987.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. DAVID THOMAS, Appellant.—THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. TYRONE PATTERSON, Appellant.

JUSTICE MORAN delivered the opinion of the court.

A Cook County grand jury indicted the defendants, David Thomas and Tyrone Patterson, and a third individual, Juan McCune, charging each with two counts of murder (Ill. Rev. Stat. 1981, ch. 38, pars. 9—1(a)(1), 9—1(a)(2)) and one count of armed violence (Ill. Rev. Stat. 1981, ch. 38, par. 33A—2) for the murder of James Kevin Jackson. Prior to trial, McCune agreed to testify on behalf of the State. The State, in return, agreed to dismiss the murder charges pending against him and not to contest a plea of guilty to concealment of a homicidal death. After a joint trial, the jury found both defendants guilty of murder. The trial court sentenced Thomas to 28 years' imprisonment and Patterson to 24 years. The appellate court affirmed both defendants' convictions and sentences. (140 Ill. App. 3d 421.) We allowed the defendants' petitions for leave to appeal under Rule 315 (103 Ill. 2d R. 315).

The issues presented for review are: (1) whether the trial court erred in admitting Patterson's uncounseled post-indictment statements to the police and an assistant State's Attorney, and (2) whether the trial court erred in denying Thomas' motion for severance.

On August 21, 1983, at approximately 3 a.m., the defendants and Carl Harmon, all of whom were members of the Vice Lords street gang, and McCune, who belonged to a gang aligned with the Vice Lords, were walking toward the 1623 Club in Evanston. When they arrived, they saw several members of a rival gang, the Black Mobsters, and a fight broke out. After the fight, they ran to Thomas' house. At trial, McCune testified that approximately 10 minutes after they arrived, Jackson, a member of the Black Mobsters, drove past Thomas' house and stopped. Jackson then backed up and stopped near Thomas' house. Words were exchanged, and Thomas punched Jackson in the jaw, opened the driver's door and began hitting Jackson. McCune testified that he ran to the car and started to hit Jackson.

while Patterson was in the back seat of the car also hitting Jackson. Harmon pulled Jackson out the passenger side of the car. The defendants kicked and beat Jackson about his head and body as he lay beside the curb. McCune also testified that Patterson struck Jackson with his shoe two or three times. Thomas and Harmon had each kicked and hit Jackson about 10 times and Harmon had "jumped on his head." Patterson and Harmon then lifted Jackson and put him face down into the back seat of the car with them. Thomas sat in the front passenger seat while McCune drove the car approximately 1½ blocks north through a park to a dead end.

When they arrived, Patterson and Harmon pushed Jackson out of the car. Harmon dragged Jackson, striking and hitting him, and threw him face down into a puddle of water. Thomas then suggested that they throw Jackson over the fence into a canal. Harmon instructed McCune to go get a knife, and Patterson told him to go get the knife he had left at Patterson's house earlier. McCune drove away and did not return to the scene of the murder. Police found Jackson's body later that morning.

At approximately 4 o'clock that afternoon, Evanston police arrested McCune pursuant to a warrant for battery and mob action in connection with the fight that occurred near the 1623 Club. Patterson and Thomas were also subjects of the same arrest warrant. While he was in custody, McCune waived his *Miranda* rights and gave a statement regarding the fight near the 1623 Club. McCune was also questioned about the killing of Jackson and gave a statement implicating Patterson, Thomas, Harmon and himself.

Patterson was arrested pursuant to the warrant at about 7 p.m. that evening. He waived his *Miranda* rights and gave a statement concerning the fight near the 1623 Club. Officer Michael Gresham then questioned Patterson concerning the killing of Jackson. Patterson indicated that he knew nothing about it. Police arrested Thomas at about 11 p.m. that night pursuant to the warrant on which they had arrested McCune and Patterson.

The next day, Assistant State's Attorney Robert Friedman interviewed Thomas. He informed Thomas that he was assisting the police in the investigation of the homicide of Jackson and was not there to represent him. After Friedman advised him of his *Miranda* rights,

Thomas stated he wished to give a statement. Thomas indicated that the police had treated him fairly while he was in custody. Friedman told Thomas that a witness, Nancy Adams, told police that she had seen him and three other people beating someone on the street in Evanston. He also told Thomas that McCune had given the police a statement placing both himself and Thomas at the canal where police found Jackson's body and describing what had happened there. Friedman then told Thomas that, according to McCune's statement, Thomas remained with the victim at the scene when he left the area. Thomas responded that that was true. When Friedman asked whether McCune had left the area by himself, however, Thomas indicated that he did not wish to answer any further questions and requested counsel. Friedman immediately terminated the interview and proceeded to leave the room. As he approached the door, however, Thomas said: "You know the police took my shoes and prints, but they won't find anything because I wasn't where the body was found." Later that day, McCune gave Friedman a statement which, again, implicated the defendants, Harmon and himself. That evening, police advised Patterson that he had been implicated in a murder and that "charges were either approved or [that the police were] seeking charges at that time."

On August 23, a Cook County grand jury indicted the defendants and McCune for Jackson's murder. Officer Gresham removed Patterson from the lockup to process and transfer him to Cook County jail. When Gresham told Patterson that he had been indicted, Patterson asked how many people had been indicted. Gresham informed Patterson that Thomas and McCune had also been indicted. Patterson then asked why Harmon had not been indicted and told Gresham that "Harmon did everything." Patterson also told Gresham that Harmon said he had told a neighbor that he had killed somebody. At that point, Gresham stopped Patterson and gave him a *Miranda* waiver form. Gresham read the warnings aloud as Patterson read along with him. After Patterson initialed each warning and signed the waiver, he described how Jackson was attacked and pulled from his car. He admitted having struck the victim several times with his fist and with the victim's shoe during the initial beating that occurred near his house. He told Gresham

that McCune and Harmon put Jackson back into his car. Jackson was then driven to the dead end and dragged from his car. He further stated that, after McCune left the dead end, Harmon beat Jackson about the head and face with clay boulders and threw him into a mud puddle.

Later that day, Assistant State's Attorney George Smith, of the felony-review unit, also interviewed Patterson. Patterson verified that he had signed and initialed the *Miranda* waiver form that Gresham had given him. He indicated that he understood his rights. Smith again advised Patterson of his *Miranda* rights and explained that he was assisting the police in the investigation of a murder and that he was not representing Patterson. Patterson indicated that he understood. He said that he had been treated well by the police, had been fed and had rested. He also told Smith that he was making the statement of his own free will and without having been threatened or promised anything. Patterson then gave Smith a detailed account of Jackson's murder.

Before trial, Patterson moved to suppress his statements and Thomas moved to sever his trial from Patterson's. The court denied both motions but later granted Thomas' motion *in limine*, instructing the State to refrain from using Thomas' name when introducing Patterson's statements and to eliminate all references to Thomas' being in the victim's car.

At trial, Officer Gresham testified regarding Patterson's arrest. He further testified concerning the statement that Patterson made after learning that he had been indicted. Assistant State's Attorney Smith also testified concerning Patterson's statement. Smith's testimony essentially corroborated Gresham's. In addition, Smith testified that Patterson told him that Harmon instructed McCune to go get a knife. Patterson recalled telling Harmon and McCune that there was a knife at his house. He told Smith that McCune then drove Jackson's car away from the scene. Smith also testified that Patterson stated that he and Harmon then fled the scene together and Thomas ran off in a different direction. Thomas objected to Smith's testimony that Thomas was at the scene and fled. The court sustained his objection and instructed the jury to disregard the testimony insofar as it concerned Thomas.

Patterson neither testified nor presented any evi-

dence at trial. Thomas, however, testified in his own defense. He admitted that he punched Jackson in the jaw once but denied participating in the beating that occurred near his house, getting into the victim's car and riding to the dead end. He testified that he stood on the sidewalk in front of his house and watched Jackson's car drive toward the dead end and stop. Thomas also testified that he then walked to the area where Jackson's car was parked, but stopped approximately 25 feet from the others. He testified that he saw Harmon "making downward motions *** with his hands," but was unable to determine whether Harmon had an object in his hands. Finally, Thomas testified that he did not help, encourage or even say anything while he stood there.

Defendant Patterson contends that neither the admonitions required by *Miranda* under the fifth amendment nor his knowledge of the fact that he had been indicted for Jackson's murder afforded him sufficient information to knowingly and intelligently waive his sixth amendment right to counsel. Patterson also contends that this information was insufficient to enable him to knowingly and intelligently waive the right to counsel guaranteed by our State constitution (Ill. Const. 1970, art. I, sec. 8). Consequently, he maintains that his uncounseled post-indictment statements to Officer Gresham and Assistant State's Attorney Smith were obtained in violation of both his sixth amendment right to counsel and his right to counsel guaranteed by our State constitution.

Patterson correctly observes that the sixth amendment right to counsel and the right to have counsel present during interrogation, which is guaranteed by *Miranda* to safeguard the accused's fifth amendment privilege against self-incrimination, are separate and distinct rights. (*People v. Martin* (1984), 102 Ill. 2d 412, 419, *cert. denied* (1984), 469 U.S. 935, 83 L. Ed. 2d 270, 105 S. Ct. 334.) Consequently, he contends that *Miranda* warnings, which were fashioned to protect the accused's fifth amendment privilege, do not serve to create a sufficiently meaningful comprehension of the sixth amendment right to counsel. Absent such comprehension of all the facts necessary to an understanding of the sixth amendment right to counsel, he concludes that he could not have knowingly waived that right. Patterson urges this court to hold that the State must satisfy a higher burden to establish a knowing and intelligent waiver of

the sixth amendment right to counsel than is necessary to establish a waiver of the right to counsel guaranteed by *Miranda*. This court recently rejected this argument in *People v. Owens* (1984), 102 Ill. 2d 88, *cert. denied* (1984), 469 U.S. 963, 83 L. Ed. 2d 297, 105 S. Ct. 361.

The defendant in *Owens* argued that a higher standard of waiver applies to the waiver of the sixth amendment right to counsel. This court first noted that the Supreme Court has expressly reserved ruling on the question of whether waivers of the sixth amendment right to counsel must be judged by a higher standard than that which is applicable to waivers of the right to counsel under *Miranda*. (*People v. Owens* (1984), 102 Ill. 2d 88, 102.) The Supreme Court again reserved ruling on this question last term. (See *Michigan v. Jackson* (1986), 475 U.S. —, — n.10, 89 L. Ed. 2d 631, 642 n.10, 106 S. Ct. 1404, 1411 n.10.) The lower courts that have addressed this issue are not in agreement. See *People v. Owens* (1984), 102 Ill. 2d 88, 102; see also 1 W. LaFave & J. Israel, Criminal Procedure sec. 6.4(f), at 472 (1984).

In *Owens*, the defendant was advised of his *Miranda* rights and signed a waiver of those rights prior to interrogation. Nevertheless, he argued that he could not have validly waived his sixth amendment right without knowledge of the fact that a criminal complaint charging him with murder had been filed. The court found that the defendant knew he was being held for questioning in connection with a murder. In concluding that the defendant validly waived his sixth amendment right to counsel, the court stated:

> "[H]e was aware of the severity of the situation facing him and, since he had been given his *Miranda* warnings, he knew he had the right to have an attorney present during questioning. Considering these facts, together with defendant's familiarity with the *Miranda* warnings, we have no doubt of the admissibility of the statements ***." *People v. Owens* (1984), 102 Ill. 2d 88, 102-03.

Like the defendant in *Owens*, Patterson was aware of the gravity of his situation. After he was arrested on battery and mob-action charges, he was questioned concerning a murder. The record establishes that Patterson was informed of the fact that he had been indicted for murder before he gave his statements to Officer Gresham and Assistant State's Attorney Smith. Smith

explained his role as an assistant State's Attorney by informing Patterson that he was not representing Patterson, but was assisting the police in a murder investigation. Patterson indicated that he understood.

We also believe that Patterson, like the defendant in *Owens*, understood his constitutional rights before he gave his statements. The record reveals that when Patterson began to talk to Officer Gresham, Gresham stopped him and gave him a *Miranda* waiver form. Thus, before he gave his statement to Gresham, Patterson was informed that he had the right to remain silent and that if he chose to forgo that right, anything he said could and would be used against him in court. He was also informed that he had a right to have an attorney present during questioning. Before Assistant State's Attorney Smith interviewed Patterson, Patterson verified his signature and initials on the *Miranda* waiver form. Smith then advised Patterson of his *Miranda* rights again. Patterson indicated that he understood his rights and had no questions regarding them. We therefore conclude that, like the defendant in *Owens*, Patterson was aware of the gravity of his situation and that he understood his constitutional rights before he gave his statements to Officer Gresham and to Assistant State's Attorney Smith. He therefore knowingly and intelligently waived his sixth amendment right to counsel.

We next address Thomas' argument that the trial court erred in denying his motion for severance. A defendant may request a severance if he believes that joinder of his case with that of a codefendant will result in prejudice. (Ill. Rev. Stat. 1985, ch. 38, par. 114–8.) In *People v. Bean* (1985), 109 Ill. 2d 80, 92, this court stated that "[a] defendant does not have an automatic right in Illinois to be tried separately from his codefendants simply because they were all charged in the same indictment for crimes arising from the same circumstances." Rather, defendants who are jointly indicted are to be jointly tried unless a separate trial is necessary to avoid prejudice to one of the defendants. (*People v. Olinger* (1986), 112 Ill. 2d 324, 345.) The decision whether to grant a separate trial is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Lee* (1981), 87 Ill. 2d 182, 186.

This court has recognized that prejudice may occur

where a codefendant makes extrajudicial hearsay admissions that inculpate the defendant. (*People v. Olinger* (1986), 112 Ill. 2d 324, 345; *People v. Daugherty* (1984), 102 Ill. 2d 533, 541.) The defendant may be denied his sixth amendment right to confrontation if the codefendant's hearsay admission is admitted against him and the codefendant does not testify. (*People v. Daugherty* (1984), 102 Ill. 2d 533, 541.) "Because the defendant cannot call the codefendant to the stand for cross-examination, either a separate trial should be ordered or the admission should be redacted to eliminate any references to the defendant." (*People v. Lee* (1981), 87 Ill. 2d 182, 187; see also *Bruton v. United States* (1968), 391 U.S. 123, 134 n.10, 20 L. Ed. 2d 476, 484 n.10, 88 S. Ct. 1620, 1626-27 n.10; *People v. Clark* (1959), 17 Ill. 2d 486, 490.) In *Bruton*, the Supreme Court held that the confrontation clause is violated where there is a "substantial risk" that a jury, despite limiting instructions, looked to a nontestifying codefendant's extrajudicial statements in assessing the defendant's guilt. 391 U.S. 123, 126, 20 L. Ed. 2d 476, 479, 88 S. Ct. 1620, 1622.

Thomas maintains that he was prejudiced by the testimony of Officer Gresham and Assistant State's Attorney Smith concerning Patterson's statements. He argues that Patterson's statements, viewed in the context of the other evidence in this case, implicated him by implying that he was present at the scene of the murder. In support of his motion for severance, Thomas argued that, contrary to his own statement, Patterson's statements would place him in Jackson's car and at the scene where his body was found. Thomas' counsel admitted that Patterson's statement did not, however, indicate that Thomas struck Jackson while he was at the dead end. After reviewing summaries of both defendants' oral statements, the court noted that Thomas, by his own statement, implicitly placed himself at the scene when he told Assistant State's Attorney Friedman that McCune drove away from the park alone. Therefore, the court denied the motion for severance. As stated earlier, however, the court granted Thomas' motion *in limine* and instructed the State to refrain from using Thomas' name when introducing Patterson's statements and to eliminate all references to Thomas' being in the victim's car.

Contrary to the court's ruling, however, Assistant State's Attorney Smith testified that Patterson told him

that "Thomas ran off" from the scene of the murder. As noted earlier, the court immediately sustained Thomas' objection and instructed the jury to disregard the reference to Thomas. Smith's testimony placed Thomas at the murder scene. Nevertheless, we do not find that it prejudiced Thomas. First, the State introduced testimony concerning Thomas' own statement in which he placed himself at the scene. Assistant State's Attorney Friedman testified concerning his interview of Thomas. He testified that he confronted Thomas with McCune's statement that Thomas was at the canal with the victim when McCune left the area. Friedman testified that Thomas responded that that was true. Patterson's statements did not otherwise implicate Thomas. In addition, the court instructed the jury: "Mere presence or negative acquiescence is not sufficient to make a person accountable for the acts of another."

Moreover, unlike the prosecutor in *Bruton*, the State presented other evidence of Thomas' guilt. McCune testified that Thomas hit and kicked Jackson approximately 10 times during the initial attack near Thomas' house. Lequita Adams, an ex-girlfriend of Thomas' who lived across the street from him, testified that she saw him throw the first punch at the driver of Jackson's car. Lequita Adams' mother, Nancy Adams, also identified Thomas and testified that he participated in the beating that occurred near his house. In addition, the State presented the testimony of Roger Shirk, a forensic scientist, that footprints found in the mud near Jackson's body could have been made by the shoes taken from Thomas shortly after he was arrested. Having reviewed the record, we find that Patterson's statements, as testified to by Officer Gresham and Assistant State's Attorney Smith, did not "add[ ] substantial, perhaps even critical, weight to the Government's case" against Thomas. (*Bruton v. United States* (1968), 391 U.S. 123, 127-28, 20 L. Ed. 2d 476, 480, 88 S. Ct. 1620, 1623.) We therefore conclude that the trial court did not abuse its discretion in denying Thomas' motion for severance.

The State filed a motion to strike Patterson's reply brief insofar as it alleges that his trial counsel was incompetent, or in the alternative, for leave to file a response thereto. The State was granted leave to file a response, and the motion to strike was taken with the case. In support of its motion to strike, the State argues

that Patterson first asserted that his trial counsel was incompetent in his reply brief in the appellate court. The appellate court did not address this issue.

As he did in the appellate court, Patterson first raised the question of his trial counsel's competence in this court in his reply brief. Our Rule 341(e), which sets forth detailed and comprehensive instructions concerning the contents of the appellant's brief, applies to criminal as well as civil appeals. (103 Ill. 2d R. 341(e); 87 Ill. 2d R. 612(i).) Rule 341(e)(7) expressly provides: "Points not argued are waived and shall not be raised in the reply brief." (103 Ill. 2d R. 341(e)(7).) Similarly, this court has held that an argument not raised in the initial brief is deemed waived for purposes of review. *Murdy v. Edgar* (1984), 103 Ill. 2d 384, 393.

Nonetheless, Patterson's counsel seeks to circumvent the rules and holdings of this court, contending that the issue of counsel's effectiveness is a proper matter for a reply brief. He relies on *People v. George* (1986), 140 Ill. App. 3d 1001, 1005, and *People v. Maxwell* (1980), 89 Ill. App. 3d 1101, 1104, as authority for his position. Our Rule 341(g), however, clearly and specifically states: "The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee." (103 Ill. 2d R. 341(g).) Patterson's counsel's attempt to advance for the first time in this court the new issue of trial counsel's competence in the guise of a response to the State's waiver argument is in direct violation of this court's Rules 341(e)(7) and 341(g). We strongly disapprove of counsel's deliberate disregard for and attempt to circumvent this court's rules.

For the foregoing reasons, the State's motion to strike portions of Patterson's reply brief, which was taken with the case, is allowed; in cause No. 63144, the judgment of the appellate court is affirmed; and in cause No. 63149, the judgment of the appellate court is affirmed.

Motion allowed;
judgments affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

OPPOSITION BRIEF

ORIGINAL

NO. 86-7059

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TYRONE PATTERSON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant, who was informed that he was indicted for murder, knowingly and intelligently waived his Sixth Amendment Right to counsel where he was given his Miranda warnings on two occasions, where defendant signed a Miranda waiver, where defendant acknowledged that he understood his rights, and where he acknowledged that he was making the statement of his own free will.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The petitioner was found guilty of the offense of murder following a trial in the Circuit Court of Cook County, Illinois. The decision of the trial court was affirmed by the Illinois Appellate Court (People v. Patterson, 140 Ill.App.3d 421, 488 N.E.2d 1283, January 21, 1986) The decision of the Illinois Appellate Court was affirmed by the Illinois Supreme Court (People v. Patterson, No. 63149, April 16, 1987). See Appendix A.

JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C sec. 1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the instant petition for writ of certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS

The facts relevant to the issues raised by petitioner are adequately set forth in the opinion of the court below, and need not be restated at length. Respondent directs this Court's attention to the argument portion of this Brief in Opposition, wherein the facts pertaining to the claim of error are discussed.

REASON FOR DENYING WRIT

A CRIMINAL DEFENDANT, WHO WAS INFORMED THAT HE WAS INDICTED FOR MURDER, KNOWINGLY AND INTELLIGENTLY WAIVED HIS SIXTH AMENDMENT RIGHT TO COUNSEL WHERE HE WAS GIVEN HIS MIRANDA WARNINGS ON TWO OCCASIONS, WHERE DEFENDANT SIGNED A MIRANDA WAIVER, WHERE DEFENDANT ACKNOWLEDGED THAT HE UNDERSTOOD HIS RIGHTS, AND WHERE HE ACKNOWLEDGED THAT HE WAS MAKING THE STATEMENT OF HIS OWN FREE WILL.

It is the petitioner's contention that Miranda warnings are not sufficient to assure that a charged defendant can knowingly and intelligently waive his right to counsel at his post-indictment interrogations. The respondent maintains that the record clearly reflects that defendant's Sixth Amendment right to counsel was protected.

This Court has long recognized that once adversary proceedings have commenced against an individual, he has the right to legal representation when the government interrogates him. Brewer v. Williams, 430 U.S. 387, 401, 97 S.Ct. 1232 (1977); Michigan v. Jackson, 475 U.S. ___, 106 S.Ct. 1404 (1986). The Sixth Amendment right to counsel is automatically invoked as soon as adversary proceedings begin without any assertion of that right by the accused. Brewer, 430 U.S. at 405.

Nevertheless, an accused may waive his rights under the Sixth and Fourteenth Amendments. Id. In determining the question of waiver, it is incumbent upon the State to prove "an intentional relinquishment or abandonment of a known right or privilege." Id., quoting Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938). The courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and do not presume the acquiescense in the loss of fundamental

rights. Johnson, supra, 304 S.Ct. at 464. The determination of whether there has been an intelligent waiver of one's right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. Id.; Brewer, supra, 430 U.S. at 403-404.

Petitioner submits that this court should hear the instant case because the validity of the respondent's waiver can not be determined. However, the record clearly reveals that the Illinois Supreme Court correctly held that petitioner voluntarily and intentionally waived his right to counsel.

Petitioner was informed by Officer Gresham that he was indicted for murder. Petitioner then was informed that Thomas and McCune were also indicted. Petitioner immediately asked why Harmon was not indicted and told the officer that Harmon had murdered the victim. Petitioner also stated that Harmon told his neighbor about it.

At that point, Officer Gresham stopped petitioner and gave him a Miranda waiver form. Officer Gresham read the warnings aloud as petitioner read along with him. After petitioner initialed each warning and signed the waiver, he explained his involvement in the murder.

Later in the day, an assistant state's attorney interviewed petitioner. Initially, the assistant verified that petitioner signed and initialed the Miranda waiver which Officer Gresham had given him. Petitioner then indicated that he understood his rights. The assistant then gave petitioner his Miranda warnings and also advised him that the assistant was not his attorney. Petitioner indicated that he understood and that he was making the statement of his own free will. Petitioner then gave the assistant a detailed account of the murder.

The Illinois Supreme Court affirmed the lower court's decision and found that the above facts reflect petitioner's knowing and intelligent waiver of his Sixth Amendment right to counsel. In arriving at its decision, the Illinois Supreme Court relied on People v. Owens, 102 Ill.2d 88, 464 N.E.2d 261 (1984), cert. denied 469 U.S. 963, 105 S.Ct. 361 (1984).

In Owens, the defendant contended that in order for him to make an understanding waiver, the Sixth Amendment entitled him to know that a complaint had been filed charging him with murder. Id., 102 Ill.2d at 102. The Illinois Supreme Court held that the defendant properly waived his Sixth Amendment right to counsel where the defendant in fact possessed some knowledge of the complaint charging him with murder. Id. In addition, the defendant explicitly acknowledged in his suppression-hearing testimony that he knew that he was being held for questioning in a murder. Id. The defendant was also given his Miranda warnings prior to questioning. Id. Thus, based on the above facts, the court held that the defendant's Sixth Amendment rights were not violated.

As in Owens, the facts in the instant case reveal that the court correctly concluded that the petitioner voluntarily and intentionally waived his Sixth Amendment right to counsel. Petitioner was aware of the gravity of his situation because he was informed of his indictment for murder. Before he gave his statement, petitioner was given his Miranda warnings. In addition, prior to giving another statement to the assistant state's attorney, petitioner was once again given Miranda warnings. Petitioner also indicated to the assistant that he signed the statement given to Officer Gresham. Finally, besides indicating that he understood his rights, petitioner stated that he was giving the statement of his own free will. Thus, in accordance with the test put forth in Brewer, supra, the record substantially demonstrates that petitioner knowingly and intentionally waived his right to counsel. Thus, for all the above reasons, the petition for writ of certiorari must be denied.

CONCLUSION

Wherefore, for all the foregoing reasons the respondent prays that this Honorable Court deny the instant petition for a writ of certiorari.

Respectfully submitted,

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Assistant State's Attorneys,
Of Counsel.

*Attorney of Record.

Q Do you see Gresham's signature on there?
A Mitchum, yes, I do.
Q And do you see Tyrone Patterson's signature on there?
A Yes, I do.
Q Are his initials on there?
A Yes, they are.
Q After Tyrone Patterson signed that statement did you question him about the James Kevin Jackson homicide?
[23] A I told him to continue on telling me what he started to say.
Q How long did you talk to him for?
A Approximately 40—30, 40 minutes.

• • • •

[26] CROSS EXAMINATION

BY Mr. Gevirtz:

• • • •

[59] Q But it was after that statement he was stopped, is that correct?
A I'm not sure if it was after that statement, counsel.
Q Would your report refresh your memory as to exactly when you stopped him to give him his rights?
A I read it.
Q Does that refresh your recollection now?
A Yes, it does.
Q It was after that statement that he was read his rights, is that correct?
A It was after—which statement, counsel?
Q After the statement Mr. Patterson said Harmon was the one who did everything. He further stated if the officers would talk to a girl named Dorisa who lives next door she would tell the officer that Carl had come over to her house and told her that he had killed someone.
A That is correct.
Q And then he was read his rights, is that right?
A He was stopped at that point and given his [60] Miranda warnings.

Q And he was also given a waiver to sign at that point?
A That is correct.
Q And prior to the two days that he had been there, never was he given a waiver to either execute or sign, correct?
A No, he was not.
Q And that was the first waiver he signed?
A That is correct.

• • • •

[71] GEORGE J. W. SMITH,

called as a witness on behalf of the People of the State of Illinois, on the motion, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY: Mr. Calihan

• • • •

[73] Q Now, when Mr. Patterson was brought in what happened in there?
A Mr. Patterson came in, introduced myself to him. He sat down. I asked him if he would like a cup of coffee or glass of water or cigarette. He declined, taking neither the coffee or the water but did have a cigarette.
Q. Now, incidentally, Mr. Smith, when you were speaking with him, who else was present in the room?
A Just myself and Mr. Patterson.
Q And could you describe this room that you were in?
[74] A The room is approximately twenty feet by thirty feet, has a desk with a chair on rollers behind it and a number of chairs in front of the desk. It was air-conditioned and the air-conditioner was on.
Q And also at the time you saw Mr. Patterson was he cuffed or uncuffed?
A He was not handcuffed at the time I talked to him.

Q Did you ever see him handcuffed at any time that day?

A I did not.

Q Now, again after Mr. Patterson indicated that he did not want anything other than the cigarette, did he accept your cigarette?

A Yes, he did. I believe he had his own pack with him.

Q What was the next thing that happened?

A At that time I showed him a document entitled Miranda Rights Form, which bore the signature of a Tyrone Patterson and a T.P. initialing on each of five paragraphs on the document. I asked him if he recognized that document.

Q When you showed him the document with the initials and the signature on it, what did he tell you?

[75] A He told me that it was his signature on the bottom of the document and he did initial each one of the five paragraphs. I asked him if he understood that document. He stated to me that he did. I also asked him if he had any questions concerning that document and he stated that he did not. I then read him the entire contents of the document and at the end of it asked him again whether or not he understood the rights that were enumerated. He said he did. I asked him again if he had any questions. He stated to me that he did not.

Q Now, if I may interrupt you for one moment, Mr. Smith. I'm showing you what's been marked as People's Exhibit No. 4. Can you take a look at that and identify what that is?

A Yes, I can identify it because it has my signature on the bottom of it. This is the form of rights that I both showed to Mr. Patterson and read to him from.

Q And People's Exhibit No. 4 is what you were just referring to?

A Yes, it is.

Q After you told him the Miranda rights and showed him People's Exhibit No. 4, did you tell him [76] anything?

A Yes, I did. I explained to him that I was an Assistant State's Attorney working in felony review, assisting the police in the investigation of a murder which had allegedly occurred on the 21st day of August, at about 3:30 in the morning. I asked him if he understood that. He replied that he understood that I was not his attorney, that I was helping the police in a murder investigation.

Q Now, after you had given him his rights and told him who you were and what you did, at that time did you ask him anything further concerning this case?

A Yes, I did. I asked him if at this time he wished to make a statement. He replied that he did. I asked him if any threats or promises had been made to him to induce him to make this statement. He stated that no one had threatened him or made him any promises. He wanted to talk because what he was going to tell me was the truth.

• • • •

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION
SECOND DISTRICT

(Title Omitted in Printing)

TRIAL PROCEEDINGS

February 9, 1984

• • • •

[715] INVESTIGATOR MICHAEL GRESHAM, called as a witness on behalf of the People of the State of Illinois, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY: MR. SMEETON

• • • •

[729] Q. When you got back there, what did you do?

A. Brought the defendant up from the holding cell. That is the cells that they were kept in at that time, and we informed them of the charges.

Q. Did you bring them up together or separately?

A. Brought them up together, but informed them separately.

Q. Did you inform Tyrone Patterson?

A. Yes, I did.

Q. Did he ask you why you were talking to him?

A. Yes, sir.

Q. What did he say?

A. He asked me how many people were indicted.

Q. What did you tell him?

A. I told him three were.

Q. Did he respond to that?

A. Yes, sir.

Q. What did he say?

A. He asked me why wasn't Carl Harmon indicted.

Q. How did he know Carl Harmon wasn't indicted?

A. (No audible response.)

Q. Did you tell him who was indicted?

[730] A. Yes.

Q. Who did you tell him?

A. He was, Juan Mc Cuen, and David Thomas.

Q. What did he say when you told him?

A. He said Carl Harmon did everything.

Q. What did you do then?

A. After another sentence or two I stopped him.

Q. What were the other sentences?

A. He stated that if I could speak to a person by the name of Deresa who lived nextdoor. She would tell me that Carl had stated that he had killed someone that day.

Q. Did you subsequently talk to Deresa?

A. Yes, sir, I did.

Q. After he told you that, what did you say to him?

A. I stopped him at that point.

Q. What did you do then?

A. I gave him a Miranda Warnings waiver.

Q. And what is a Miranda Warnings waiver?

A. It's a list of the Miranda Warnings where the defendant can read for himself or have them read to him. He initials each one with the date and time and witnessed by either the officer or those who are [731] present.

Q. And in this case what did you do with that Miranda Warnings waiver as far as Tyrone Patterson goes?

A. Gave it to Tyrone Patterson.

Q. Did he read it?
A. Yes.
Q. Did you read it?
A. Yes, I did.
Q. Aloud or to yourself?
A. I read it aloud, and he head [sic] it to himself.
Q. After he read it, what did he do with it?
A. He initialed each warning, and he signed it at the bottom along with the date and time.
Q. Did anyone else sign it?
A. I affixed my signature to it along with my partner, Carlos Mitchem.
Q. I show you what I have marked as People's Exhibit 29 for Identification. Do you recognize what People's Exhibit 29 for Identification is?
A. Yes.
Q. What is this?
A. Statement of Miranda Rights.
Q. Is that the warning form you just talked about?
A. That's correct.
[732] Q. Is your signature on that?
A. Yes.
Q. Is your partner's signature on there?
A. Yes, it is.
Q. Is Tyrone's signature on there?
A. Yes, sir, it is.
Q. After Tyrone Patterson signed the waiver of his rights, did you ask him about the homicide investigation?
A. Yes, sir, I did.
Q. Did he tell you anything?
A. Yes, sir, he did.
Q. What did he tell you?
A. I told Mr. Patterson to continue with what he was telling me before I stopped him.
MR. GEVIRTZ: Object, same basis as before trial.
THE COURT: Overruled.
THE WITNESS: At which time he indicated that he was standing in front of David Thomas' house on the

night in question along with two other subjects, one Juan Mc Cuen and Carl Harmon; that a subject known to him as Pudge or James Kevin Jackson pulled down the street in a vehicle at which time Carl Harmon asked him what he wanted.

Pudge stopped. Carl Harmon approached the [733] car, removed the keys, struck Jackson in the face. They all—at which time a fight ensued between he and the others. He was pulled from the car. He indicated that Pudge had struck him and that he had struck him back several times.

Q. Did he say what he struck him back with?
A. He struck him with his fists several times. The first time during the fight the shoe came off, and he struck him several times with the shoe.
Q. Let me ask you this: Did he say whether or not David Thomas was there when Pudge pulled up?
A. Yes, sir, he did.
Q. Continue.
A. He was put back in the car. He stated by Juan and Carl. The car was driven to the deadend of Dewey. At that point the deceased was removed from the vehicle at which time Juan was sent away, and he never returned.
Q. Did he say what Juan was sent away for?
A. He didn't state to me what he was sent away at that time for.
Q. Go ahead.
A. He stated that Carl used several clay boulders in the area to beat the deceased about the face and the [734] head and to—also throw him in a mud puddle.
Q. How long did this conversation you had with Tyrone Patterson last?
A. (No audible response.)
Q. Approximately.
A. Approximately forty-five minutes.

• • • •

[792] GEORGE JAMES WILLIAM SMITH,

called as a witness herein on behalf of the State, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CALIHAN:

* * * *

[794] Q. And after speaking with Officer Gresham what did you do?

A. Officer Gresham led me back to the supervisor's office of the detective division at the rear of the building on the second floor. I there went in and sat down behind a desk and he brought in a male [795] black individual.

Q. Now, as you look around this courtroom today do you see the male that you saw brought in by Officer Gresham here in court today?

A. Yes. I do.

Q. Can you point out this fellow?

A. Yes. The man with the striped shirt on sitting at the table between the two gentlemen in suits.

MR. CALIHAN: Indicating for the record the in-court identification of the defendant, Mr. Tyrone Patterson.

Q. Now, when Officer Gresham walked in here, walked into that room that you were in with Mr. Patterson whom you just identified, what was said at first?

A. I introduced myself to Mr. Patterson and gave him my name, and asked him to be seated.

Q. And when the defendant was seated did the officer stay in the room or did he leave?

A. The officer left the room.

Q. Can you describe this room that you were in when you were in there with Mr. Patterson?

A. The room is approximately 20 feet by 30 feet. It has a desk and one chair behind the desk, and a [796] number of chairs in front of the desk. The room was air conditioned and the air conditioner was on.

Q. Now, what was the first thing that you said to Mr. Patterson after introducing yourself by name?

A. I showed Mr. Patterson a previously executed Miranda rights form which contained the initials T. P. before each of five paragraphs appearing on the document, and contained the signature of Tyrone Patterson on the bottom of the form.

I asked Mr. Patterson if he had read that form, and if he understood the rights that were enumerated on that form, if he had initialed each of those paragraphs, and if he had signed the document.

Q. What did he say when you showed him the form and asked him those questions?

A. He stated to me he had previously read the form, he did understand his rights. At that time I read him the complete form and asked him at the end whether he understood the rights that I had just explained to him. He told me that he did.

I then asked him if he had any questions about the rights that I had just told him about. He said he did not. At that juncture I signed the bottom of the form.

[797] Q. Now, Mr. Smith, directing your attention to what's been previously marked as People's Exhibit No. 29, I ask you to take a look at People's Exhibit No. 29, and what is that that I just handed you?

A. That's a statement of Miranda rights form.

Q. When is it you saw People's 29 before that waiver form?

A. On the 23rd day of August at about 5:45 p.m. in the supervisor's office in the Evanston detective division. This is the form I showed Mr. Wright—or Mr. Patterson, and this is the form he indicated he had initialed and signed, and this is also the form I read to him and signed subsequent to reading.

Q. How is it that you're able to identify People's 29?

A. Because of my signature on the bottom of the form.

Q. And was that signature, in fact, placed there by you?

A. Yes. It was.

Q. Now, incidentally, Mr. Smith, when you spoke to Tyrone Patterson could you describe what condition he was in?

A. Mr. Patterson was not handcuffed. He was [798] dressed in a blue basketball jersey with the letters—with the number 22 on it—a pair of blue jeans and gym shoes. He appeared to me to be bright and alert.

Q. Was he offered anything when he came in?

A. Yes. I offered him coffee or water, or a cigarette. He declined the coffee or the water, but he did accept the cigarette.

Q. Now, Mr. Smith, after you had gone over his rights again with Mr. Patterson, did you tell him what you—who you were and what you were doing there?

A. Yes. I explained to him that I was an assistant state's attorney working in felony review, and assisting the police in a murder investigation.

I informed him that I was not, in fact, his attorney but an attorney helping the police. I asked him if he understood that.

Q. What did he say?

A. He said he understood that I was not his lawyer, that I was working with the police on a murder investigation.

Q. Now, at that time did you acquire any additional information of Mr. Patterson concerning his custody?

A. Yes. I asked Mr. Patterson how long the police had held him in custody. He informed me he [799] had been in custody since the 21st day of August.

I asked him how he had been treated by the police, and he said he had been treated well by the police, and he had been fed and he had rested okay.

Q. Okay. Did he indicate at that time why he was making this statement?

A. Yes. He told me he was making a statement of his own free will with no threats or promises being made

to him, and he was making the statement voluntarily because it was the truth.

Q. Now, did this individual, Mr. Patterson, supply you with any additional background material?

A. Yes. He told me his name was Tyrone Patterson, that he was 17 years of age, resided at 2121 North Darrow Street in Evanston with his mother, Portia Patterson, his brothers and his sisters.

He told me that since December of 1983 he had been employed at the Noyes Cultural Arts Center on Noyes Street in Evanston, Illinois.

Q. After he supplied the background information, after you had given him his rights and introduced yourself and talked about how he had been treated, did you have a conversation relative to the incident on the 21st of August?

[800] Yes. I did.

Q. Could you please tell us what Mr. Patterson told you about what happened that night, or that early morning?

A. Patterson told me he had been at a party at about 2:30 in the morning at Church and Dodge Streets in Evanston. He told me there were about 75 people at that party, nine Vice Lords as well as between 30 and 40 Black Mobsters.

He told me that he had been on the gate of that party and observed while he was on the gate of the party a fight break out between a person known to him as Peelhead, and a number of members of not the Black Mobsters but the Vice Lords; that he got in between the fight and tried to break it up, that after he got in between the fight Peelhead told him, "Let's fight."

He told me that he said to Peelhead, "I do not wish to fight." At that time Peelhead swung at him and missed. Patterson told me he swung and missed Mr. Peelhead, and that a fight commenced between him and that individual.

• • • •

[802] Q. Mr. Smith, you indicated that he told you about a fight that he had with Peelhead, is that correct?
[803] A. That's true.

Q. Did he tell you how the fight happened and what happened at the end?

A. He told me that he was losing the fight with Peelhead when some of his friends stepped in and pulled them apart.

He said at that time that the Black Mobsters that were present at the party began fighting with the Conservative Vice Lords. At that time he, McCune, Thomas, and Harmon ran away from the party with a number of Black Mobsters chasing them.

Q. And after Mr. Patterson told you that, did he tell you where they next went, namely he and the three other individuals that you just mentioned?

A. Yes. He said they ran to a place called the 1623 Club on the corner of Dewey and Simpson Avenues. He said that two Black Mobsters followed them there, individuals known to Patterson as Andre and as a Blue Moon, whose name was Vince Smith, Vincent Smith.

Q. Could that have been Melvin Smith?

A. Yes, Melvin Smith.

• • • •

[806] MR. CALIHAN: Q. Okay. Mr. Smith, did Mr. Patterson indicate that there was a fight on that corner at that time between Andre and Blue Moon and themselves?

A. Yes. He told me that he heard—

THE COURT: Without going into the facts did he indicate there was a fight at that time?

A. Yes. He did.

Q. Okay. Now, did he indicate what happened after the fight?
[807] A. Yes. He did.

Q. What was that?

A. He said that he observed four carloads of Black Mobsters pull up, and when he observed that that he, Thomas Harmon, and McCune, ran from the location.

MR. SPECTOR: Objection.

THE COURT: The jury is directed to disregard any other name other than the defendant Patterson.

MR. CALIHAN: Q. Now, Mr. Smith, after Mr. Patterson indicated that they ran from the location, where did they go? What happened?

A. He told me they ran to Mr. Thomas's house which was on Dewey.

Q. Okay.

A. They remained there for about five minutes. Then they ran to Patterson's house on Darrow. When they arrived there they heard a number of gunshots, saw two carloads of Black Mobsters pull up, and then split up.

Q. And when he indicated that they split up, did he tell what happened to them after they split up.

A. Patterson told me that he ran into his house, and the other three ran away, that a short time later [808] the three came back and they all went back to Mr. Thomas's house on Dewey.

Q. Incidentally, when they first went from David Thomas's house, which is where they went to right after the corner incident, did they indicate how they went from David Thomas's house to Patterson's house? Was it in a group or did they split up at that time also, if you recall?

A. I believe that he said they went together in a group.

Q. Now, Mr. Smith, you indicated at some point when they were at the Patterson house they were split up, is that correct?

A. Yes.

Q. And after they had come back together again what was the next thing that happened at the Patterson house?

A. Patterson told me that they were in front of his house when they saw a maroon Chevrolet Nova pull up

containing an individual that Patterson told me whose name was Pudge.

Q. Now, when the car, the maroon Nova pulled up, whose house were they in front of at that time?

MR. GEVIRTZ: Objection. Asked and answered.

[809] MR. CALIHAN: Judge, if I could clarify this.

THE COURT: I'll let him answer.

THE WITNESS: They were in front of Thomas's house.

MR. CALIHAN: Q. Okay. Now, did Patterson indicate what happened when the maroon Nova pulled up?

A. He said that he saw Pudge driving the vehicle, that Pudge called out, "What do you want?" He heard Harmon relay, "What do you mean what do we want," saw Harmon walk over to the maroon Nova, get in it, and begin hitting Pudge.

Q. Did Patterson tell you what he did at that time?

A. Patterson told me he walked up to the car and told Harmon that Pudge was no longer a member of the Black Mobster street gang.

Q. What happened then?

A. Harmon, according to Patterson, then dragged Pudge out of the vehicle and dragged him towards a grassy area.

Q. Did Patterson tell you what he did at that time?

A. Patterson told me his topsider shoe had come off while Harmon was dragging Pudge, and that he had hit Pudge with the shoe.

Q. Now, what did Patterson tell you next happened [810] after he had hit the victim with his own shoe?

A. He then saw Harmon strike Pudge, and then drag him back to the automobile, and he heard Harmon say, "He knows our names, we've got to kill him. I just got out of prison and I can't go back."

Q. What did they do at this time? What was the next thing that happened?

A. They all got into the vehicle. McCune was—

MR. SPECTOR: Objection. Objection, Judge.

THE COURT: Overruled.

THE WITNESS: They all got in the vehicle. McCune was driving. Patterson and Pudge were in the back seat.

MR. CALIHAN: Q. Now, at this time was there a break in the conversation that you're having with Mr. Tyrone Patterson?

A. Yes. At that time I asked Mr. Patterson if he would again care for a drink of water or a cup of coffee, or a cigarette. He again declined the water and coffee but he did accept the cigarette.

Q. Did Mr. Patterson at that time have a cigarette?

A. Yes. He did.

Q. After the cigarette was completed did you [811] continue in the statement?

A. Yes. I did.

Q. What did Patterson tell you?

A. Patterson then told me after they were in the vehicle—

MR. SPECTOR: Objection.

THE COURT: Overruled.

THE WITNESS: —they traveled down to the end of the block, which was the entryway to a park, that upon approaching the park he heard Harmon tell McCune to turn the lights off on the vehicle.

The vehicle then drove through the park and down to a canal which is located in the middle of the park.

Q. What did he say happened then?

A. He said when they arrived at the canal they all got out of the vehicle, Harmon was dragging Pudge and striking and hitting him, that a short time after he heard Harmon tell McCune to go get a knife.

Q. Did Patterson say that he said anything at this time?

A. Patterson told me that he told McCune and Harmon that the knife was at his house.

Q. What happened then?

[812] A. McCune then drove the vehicle away.

Q. Did Patterson tell you what happened at the scene after McCune had left the scene?

A. He said he saw Harmon knock Pudge down and put him face down in a large puddle of water. He said he saw him pick up what he called dirt balls and strike Pudge with the dirt balls.

He said he then saw Harmon climb on Pudge's back, again striking him, and then saw him hold his head under the water of the puddle.

Q. Did he describe what happened when he saw Harmon holding the victim's head under the water?

A. Patterson told me that he saw Pudge trying to get under the water, heard a gurgling noise, and then he heard Harmon say, "He's dead, let's get out of here."

• • • •

[813] MR. CALIHAN: Q. Referring again specifically to Patterson and Harmon, did he tell you where those two went?

A. He told me that he and Harmon had ran back to Patterson's house because Harmon was staying with a Mr. Thomas, who was not related to anyone, and his girl friend, who resided directly next door to Patterson's home.

Q. Did he say what happened?

A. He said he went into his home, and a short time later Harmon came to his door and said that Thomas and his girlfriend would not let him stay the night at their home. Patterson told me he then let Harmon sleep in his living room chair.

Q. Now, did Patterson indicate anything else after he related to you the conversation—basically what happened that early morning hours from start to finish, did he tell you anything else at the end of the statement?

Let me rephrase the question.

Did he indicate to you at the end of the [814] statement why he was telling you these things?

A. Yes. At the end of the statement I asked him if he had made the statement voluntarily, of his own free

will with no threats or promises made to him during the statement to get him to talk to me. He said he had made the statement because it was the truth and because Pudge had been a friend of his.

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ILLINOIS APPELLATE COURT
FIRST DISTRICT

FIRST DIVISION

January 21, 1986

84-720
84-820 Consol.

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

TYRONE PATTERSON and DAVID THOMAS,
Defendants-Appellants.

Appeal from the Circuit Court of Cook County
Honorable Jack Stein, Judge, Presiding

JUSTICE O'CONNOR delivered the opinion of the court:

Following a joint trial, defendants Tyrone Patterson and David Thomas were found guilty of murder. (Ill. Rev. Stat. 1983, ch. 38, par. 9-1(a)(1).) Patterson was sentenced to 24 years imprisonment; Thomas to 28 years. Their appeals have been consolidated.

The following issues are presented for review: (1) whether the trial court erred in not suppressing certain statements by Patterson that allegedly were made involuntarily and in violation of his sixth amendment right to counsel; (2) whether the trial court erred in denying Thomas' motion for severance; (3) whether Patterson was denied his right of confrontation by restrictions

placed upon cross-examination by the trial court; and (4) whether various instances of prosecutorial misconduct deprived defendants of a fair trial. We affirm.

The following facts were adduced at trial. In the early morning hours of August 21, 1983, James Kevin Jackson was killed in a small park in Evanston, Illinois. The murder occurred after an evening of violent gang-related incidents. Patterson and Thomas were members of the Vice Lords street gang. The victim belonged to a rival gang. Juan McCune, who testified for the State, belonged to a gang friendly with the Vice Lords.

McCune testified at trial that at approximately 3 a.m. on Sunday, August 21, 1983, the victim drove up in front of Thomas' house located at 2113 Dewey Street in Evanston. McCune and the defendants were sitting on the front steps with a third member of the Vice Lords, Carl Harmon. They approached the car and apparently recognized the victim. After words were exchanged, the victim was pulled from the car and beaten. The victim was dragged back into the car and driven to a small park a short distance away. There, the victim was beaten again and thrown face down in a large puddle of water. He was found dead the next day.

The defendants and McCune were arrested on unrelated misdemeanor charges on August 21, 1983. Harmon was not located until after the trial. McCune provided a statement implicating Patterson, Thomas and Harmon in the murder of Jackson. Patterson initially denied knowledge of the homicide, but eventually gave an inculpatory statement to police on August 23, 1983. He had been in custody for 43 hours and was under indictment for the murder at the time he made his statement.

Prior to trial, Patterson moved to suppress his statement to police, and Thomas moved to sever his trial from Patterson's and to exclude evidence of gang membership. The court denied the motions.

At trial, McCune testified as a state witness. The State also presented the testimony of Lequita Adams, an ex-girlfriend of Thomas', and her mother, Nancy Adams, who testified Thomas "as" one of the men involved in the initial attack on the victim. Evanston police officer Michael Gresham testified about Patterson's arrest, his confinement and the circumstances surrounding his initial statement to the police. Assistant State's Attorney George Smith testified that Patterson repeated his statement later the same evening.

Patterson did not testify at trial. However, Thomas testified that he withdrew from the incident after the initial attack on the victim. He stated that he followed the car on foot to the park where he stopped 25 feet away from the others and watched Harmon "making downward motions" with his hands. He hten walked home. After closing arguments, the jury found Thomas and Patterson guilty of murder.

Initially, Patterson contends that the trial court erred in refusing to suppress his statement to police. He claims that the statement was taken in violation of his sixth amendment right to counsel, and that the circumstances surrounding his confinement rendered it involuntary. The State asserts that Patterson waived his sixth amendment argument by failing to raise it at trial or to include it in his post-trial motions. Defendant asserts that several exceptions to the waiver rule are applicable here. In view of our disposition of the case, we will assume without deciding that this issue was not waived.

At the hearing on the motion to suppress, Officer Gresham testified that Patterson was arrested on unrelated misdemeanor charges on August 21, 1983. He received *Miranda* warnings before he was placed in a lockup for the night. The next day, he was visited by his mother and his aunt. On August 23, 1983, Gresham informed Patterson that he had been indicted for murder. Patterson allegedly asked who else had been indicted and

Gresham told him that Thomas and McCune had been indicted. Patterson asked why Harmon had not been indicted since "he did everything." Gresham stopped Patterson and gave him *Miranda* warnings again. He also had Patterson sign a written *Miranda* waiver form. Patterson then described how he, Thomas, McCune and Harmon initially attacked the victim and then drove him to the park where Harmon beat the victim with clay boulders and threw him in a mud puddle.

Assistant State's Attorney Smith testified that, at about 5:30 p.m. on August 23, 1983, he questioned Patterson about the *Miranda* rights waiver form and the conditions of his confinement. Patterson said he understood his rights, had no complaints about his treatment, and then he described the incident to Smith.

At the hearing, Patterson denied receiving any warnings about his right to counsel before he gave his statement. He testified that on August 23, Gresham told him that he had been indicted for murder and that Harmon would testify. Gresham also indicated that if Patterson told him what he knew, it would go better for him. He did not sign the *Miranda* rights waiver form until after he gave his statement.

There is no question but that at the time Patterson gave his statement to police he was under indictment for murder and his sixth amendment right to counsel had attached. What is at issue is whether he effectively waived this right prior to making the statement.

The standard consistently applied in this area is whether the State has proven an intentional relinquishment or abandonment of a known right or privilege. (*Brewer v. Williams* (1977), 403 U.S. 387, 404, 51 L.Ed. 2d, 424, 97 S. Ct. 1232; *People v. Aldridge* (1980), 79 Ill. 2d 87, 93, 402 N.E.2d 176.) Patterson relies on federal court decisions for the proposition that the sixth amendment requires a higher standard for showing waiver of the

right to counsel than that required for *Miranda* waivers. Although the United States Supreme Court and the Illinois Supreme Court have not decided this question, (*Brewer v. Williams* (1977), 430 U.S. 387, 405-06; *People v. Owens* (1984), 102 Ill. 2d 88, 101-02, 464 N.E. 2d 261), we believe the result and analysis used in *Owens* is applicable here.

In *Owens*, the court held that an accused had effectively waived his sixth amendment right to counsel prior to making certain incriminating statements where:

> "defendant explicitly acknowledged in his suppression-hearing testimony that he knew he was being held for questioning in a murder. Thus, he was aware of the severity of the situation facing him and, since he had been given his *Miranda* warnings, he knew he had the right to have an attorney present during questioning." 102 Ill. 2d 88, 102-03.

In the case at bar, Patterson knew he was under indictment for murder, so he was aware of the gravity of his legal situation. Because he had been given *Miranda* warnings, he was informed of his right to have an attorney present during questioning. These facts and circumstances are sufficient to show that Patterson intelligently waived his known right to counsel before making his statements to police.

Patterson also contends that his statements were coerced and involuntary because he was denied his right to post bail, confined for 43 hours without food or sleep, and denied medical attention for a previously incurred jaw injury.

In determining the voluntariness of an inculpatory statement, the totality of the circumstances surrounding the making of the statement must be considered. (*People v. Simmons* (1975), 60 Ill. 2d 173, 326 N.E.2d 383; *People v. Wilson* (1974), 16 Ill. App. 3d 473, 306 N.E.2d 626, *modified*, 60 Ill. 2d 626.) Even where individual

facets of police conduct would not be coercive if taken singly, a combination of circumstances may act together to create sufficient pressure on the accused to produce a confession that is not "voluntary." (*People v. Washington* (1980), 90 Ill. App. 3d 631, 634, 413, N.E.2d 170, *cert. denied*, 454 U.S. 846.) Here, the trial court found that the circumstances present in this case, whether taken singly or in combination, did not render Patterson's statement involuntary. We will not reverse a trial court's finding of voluntariness unless it is against the manifest weight of the evidence. *People v. Rhoads* (1979), 73 Ill. App. 3d 288, 308, 391 N.E.2d 512.

Patterson contends that his statement was the result of an illegal detention caused by a denial of his right to post bail. He alleges that his release on bond was prevented when police officers told his mother that no bond had been set, when in fact his bond had been set at $2,000, so a cash deposit of $200 was required for his release.

While the police were not obligated orally to advise defendant of the right to post bail (*People v. Seymour* (1981), 84 Ill. 2d 24, 30-31, 416 N.E.2d 1070), the record reveals that Patterson and his mother were apprised of the amount of his bond. There is no evidence that either Patterson or his mother attempted to tender the bond money. The allegation by Patterson's mother that she had sufficient funds to pay the bond was controverted by her own testimony on cross-examination and by Officer Gresham's testimony. The trial court could properly conclude that Patterson's statements were not caused by a denial of his right to post bail.

Even though Patterson had been confined for 43 hours when he made his statement, it is clear from the record that he was not subjected to impermissibly long periods of interrogation. He was not isolated or refused access to friends and relatives. He was not denied food or opportunities for rest. Furthermore, allegations that he was denied medical attention were unsubstantiated and

contradicted by Officer Gresham and Assistant State's Attorney Smith. Clearly, the trial court's conclusion that Patterson's statement was made voluntarily was not against the manifest weight of the evidence.

Thomas contends that the trial court erred in denying his motion for severance. However, the general rule is that defendants jointly indicted should be jointly tried unless a separate trial is required to avoid prejudice to one of the defendants. (*People v. Lee* (1981), 87 Ill. 2d 182, 187, 429 N.E.2d 461.) Severance is justified where there are antagonistic defenses or where, in a joint trial, an admission of one defendant implicating a co-defendant is introduced at trial and the defendant who made the admission does not testify. (*People v. Daugherty* (1984), 102 Ill. 2d 533, 541-42. 468 N.E.2d 969.) Thomas claims that severance is required under either rationale.

We find that Patterson's defense was not antagonistic to Thomas' defense that he was near the scene of the crime, but did not participate in it. We need not decide whether the reverse is also true since only Thomas raises the issue of antagonistic defenses. *Murphy* (1981), 93 Ill. App. 3d 606, 610, 417 N.E.2d 745.

Thomas also claims that severance was required because of Patterson's pre-trial statement. Patterson's original statement to police stated that Thomas was in the car as it drove to the park and that he was present at the scene of the murder. The trial court redacted Patterson's statement to eliminate all references to Thomas being in the car or at the park. But when Officer Gresham introduced the essence of Patterson's statement at trial, he testified that Patterson said he ran out of the park with Harmon while Thomas ran off in a different direction. Counsel's objection was sustained and the jury was instructed to disregard it. Thomas now claims that this violation of the trial court's redaction order prejudicially implied that he was present at the

scene of the crime. However, Thomas testified that he stood about 25 feet from where the crime was committed and then walked out of the park shortly before the others. Patterson's redacted statement (as testified to at trial) did not contradict Thomas' trial testimony to a significant degree, nor did it implicate Thomas by showing a greater connection to the crime than was shown by his own testimony. Consequently, Patterson's redacted statement did not sufficiently conflict with Thomas' defense to warrant severance.

Moreover, Thomas' reliance on *People v. Trass* (1985), 136 Ill. App. 3d 455, 483 N.E.2d 567, is misplaced. In *Trass*, the court found Trass' defense that he merely witnessed the attack on the victim by his co-defendant, Bryant, and others, was antagonistic to Bryant's defense that he was attempting to help the victim from being robbed by the other co-defendants. (136 Ill. App. 3d 455, 460.) Severance was also required because, even though a statement by Trass was redacted to eliminate Bryant's name, other evidence clearly implicated Bryant as the perpetrator referred to in Trass' statement. (136 Ill. App. 3d 455, 460-61.) Here, in contrast, Patterson's defense was not antagonistic to Thomas' defense, and Patterson's redacted statement, even when considered with other evidence, did not directly conflict with Thomas' defense. In view of these facts and the prompt curative action by the court, we find *Trass* distinguishable and, therefore, affirm the trial court's denial of Thomas' motion for severance.

In addition, Thomas claims that the prosecutor prejudicially attacked his moral character when he was asked during cross-examination whether he had stopped dating Lequita Adams, a state witness, because he had impregnated another girl. Counsel's objection to this question was sustained and the jury was instructed to disregard any question to which an objection had been sustained. This was sufficient to cure any error regarding

this isolated question. See *People v. Belvedere* (1979), 72 Ill. App. 3d 998, 1014, 390 N.E.2d 1239, *appeal denied*, 79 Ill. 2d 622.

Patterson argues that the trial court's restrictions on defense counsel's cross-examination of Assistant State's Attorney Smith deprived him of his sixth amendment right to confront witnesses against him. He contends that, if cross-examination had been allowed to continue, he would have been able to impeach Smith by showing that Smith violated State's Attorney procedure by failing to preserve Patterson's statement in writing.

Defendants are allowed a wide latitude to show bias. (*People v. Wilkerson* (1981), 87 Ill. 2d 151, 156, 429 N.E.2d 526.) However, the scope of cross-examination rests largely within the discretion of the trial court, and we will reverse its ruling only where an abuse of that discretion results in manifest prejudice to the defendant. *People v. Owens* (1984), 102 Ill. 2d 88, 103.

In the instant case, Assistant State's Attorney Smith's testimony was not crucial to the prosecution since Officer Gresham also testified about Patterson's statement. Moreover, the jury heard evidence that the statements of other witnesses were preserved in writing, but Patterson's statement was not. Defense counsel was permitted to comment during closing arguments on the inferences to be drawn from the assistant State's Attorney's failure to preserve Patterson's statement in writing. We find the error, if any, in limiting cross-examination was harmless beyond a reasonable doubt.

Finally, Thomas contends that various comments made by the prosecutor during his closing arguments deprived him of a fair trial. A prosecutor is permitted great latitude in his closing argument (*People v. Hine* (1980), 88 Ill. App. 3d 671, 679, 410 N.E.2d 1017), and improper remarks will not require reversal of a conviction unless they constitute a material factor in defendant's conviction. (*People v. Hoddenbach* (1983), 116 Ill. App. 3d 57, 62, 452 N.E.2d 32.) Thomas now argues that the prosecutor improperly expressed his personal belief in the veracity of Juan McCune during closing arguments when he stated:

> "I turned him State's evidence a month ago. That was a decision I had to make. I put my experience, and what I see from the case into that, to make that decision. And if you think I'm wrong, fine.
>
> But, it has nothing to do with the evidence against these two, if I made a wrong decision on Juan Macuen (sic). But I had to decide, as I want you to decide, whether or not Juan Macuen (sic) was telling the truth."

In the context of the argument, the prosecutor was merely explaining how McCune became a State witness. Because the prosecutor ultimately left the issue of McCune's credibility to the jury's determination, we do not believe that the prosecutor put his personal or professional reputation behind McCune's veracity. (*People v. Beledere* (1979), 72 Ill. App. 3d 998, 1022-23; *People v. Bragg* (1979), 68 Ill. App. 3d 622, 631, 386 N.E.2d 485.) In addition, we have carefully examined defendant's other assertions of error regarding closing arguments and find them to be without merit.

For the foregoing reasons, defendants' convictions and sentences are affirmed.

Affirmed.

CAMPBELL and QUINLAN, J.J. concur.

SUPREME COURT OF ILLINOIS

Docket Nos. 63144, 63149

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

DAVID THOMAS,
Appellant.

THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee,

v.

TYRONE PATTERSON,
Appellant.

Filed April 16, 1987

JUSTICE MORAN delivered the opinion of the court:

A Cook County grand jury indicted the defendants, David Thomas and Tyrone Patterson, and a third individual, Juan McCune, charging each with two counts of murder (Ill. Rev. Stat. 1981, ch. 38, pars. 9-1(a)(1), 9-1(a)(2)) and one count of armed violence (Ill. Rev. Stat. 1981, ch. 38, par. 33A-2) for the murder of James Kevin Jackson. Prior to trial, McCune agreed to testify on behalf of the State. The State, in return, agreed to dismiss the murder charges pending against him and not to contest a plea of guilty to concealment of a homicidal death. After a joint trial, the jury found both defendants guilty of murder. The trial court sentenced Thomas to 28 years' imprisonment and Patterson to 24 years. The appellate court affirmed both defendants' convictions and sentences. (140 Ill. App. 3d 421.) We allowed the defendants' petitions for leave to appeal under Rule 315 (103 Ill. 2d R. 315).

The issues presented for review are: (1) whether the trial court erred in admitting Patterson's uncounseled post-indictment statements to the police and an assistant State's Attorney, and (2) whether the trial court erred in denying Thomas' motion for severance.

On August 21, 1983, at approximately 3 a.m., the defendants and Carl Harmon, all of whom were members of the Vice Lords street gang, and McCune, who belonged to a gang aligned with the Vice Lords, were walking toward the 1623 Club in Evanston. When they arrived, they saw several members of a rival gang, the Black Mobsters, and a fight broke out. After the fight, they ran to Thomas' house. At trial, McCune testified that approximately 10 minutes after they arrived, Jackson, a member of the Black Mobsters, drove past Thomas' house and stopped. Jackson then backed up and stopped near Thomas' house. Words were exchanged, and Thomas punched Jackson in the jaw, opened the driver's door and began hitting Jackson. McCune testified that he ran to the car and started to hit Jackson, while Patterson was in the back seat of the car also hitting Jackson. Harmon pulled Jackson out the passenger side of the car. The defendants kicked and beat Jackson about his head and body as he lay beside the curb. McCune also testified that Patterson struck Jackson with his shoe two or three times, Thomas and Harmon had each kicked and hit Jackson about 10 times and Harmon had "jumped on his head." Patterson and Harmon then lifted Jackson and put him face down into the back seat of the car with them. Thomas sat in the front passenger seat while McCune drove the car approximately 1½ blocks north through a park to a dead end.

When they arrived, Patterson and Harmon pushed Jackson out of the car. Harmon dragged Jackson, strik-

ing and hitting him, and threw him face down into a puddle of water. Thomas then suggested that they throw Jackson over the fence into a canal. Harmon instructed McCune to go get a knife, and Patterson told him to go get the knife he had left at Patterson's house earlier. McCune drove away and did not return to the scene of the murder. Police found Jackson's body later that morning.

At approximately 4 o'clock that afternoon, Evanston police arrested McCune pursuant to a warrant for battery and mob action in connection with the fight that occurred near the 1623 Club. Patterson and Thomas were also subjects of the same arrest warrant. While he was in custody, McCune waived his *Miranda* rights and gave a statement regarding the fight near the 1623 Club. McCune was also questioned about the killing of Jackson and gave a statement implicating Patterson, Thomas, Harmon and himself.

Patterson was arrested pursuant to the warrant at about 7 p.m. that evening. He waived his *Miranda* rights and gave a statement concerning the fight near the 1623 Club. Officer Michael Gresham then questioned Patterson concerning the killing of Jackson. Patterson indicated that he knew nothing about it. Police arrested Thomas at about 11 p.m. that night pursuant to the warrant on which they had arrested McCune and Patterson.

The next day, Assistant State's Attorney Robert Friedman interviewed Thomas. He informed Thomas that he was assisting the police in the investigation of the homicide of Jackson and was not there to represent him. After Friedman advised him of his *Miranda* rights, Thomas stated he wished to give a statement. Thomas indicated that the police had treated him fairly while he was in custody. Friedman told Thomas that a witness, Nancy Adams, told police that she had seen him and three other people beating someone on the street in

Evanston. He also told Thomas that McCune had given the police a statement placing both himself and Thomas at the canal where police found Jackson's body and describing what had happened there. Friedman then told Thomas that, according to McCune's statement, Thomas remained with the victim at the scene when he left the area. Thomas responded that that was true. When Friedman asked whether McCune had left the area himself, however, Thomas indicated that he did not wish to answer any further questions and requested counsel. Friedman immediately terminated the interview and proceeded to leave the room. As he approached the door, however, Thomas said: "You know the police took my shoes and prints, but they won't find anything because I wasn't where the body was found." Later that day, McCune gave Friedman a statement which, again, implicated the defendants, Harmon and himself. That evening, police advised Patterson that he had been implicated in a murder and that "charges were either approved or [that the police were] seeking charges at that time."

On August 23, a Cook County grand jury indicted the defendants and McCune for Jackson's murder. Officer Gresham removed Patterson from the lockup to process and transfer him to Cook County jail. When Gresham told Patterson that he had been indicted, Patterson asked how many people had been indicted. Gresham informed Patterson that Thomas and McCune had also been indicted. Patterson then asked why Harmon had not been indicted and told Gresham that "Harmon did everything." Patterson also told Gresham that Harmon said he had told a neighbor that he had killed somebody. At that point, Gresham stopped Patterson and gave him a *Miranda* waiver form. Gresham read the warnings aloud as Patterson read along with him. After Patterson initialed each warning and signed the waiver, he described how Jackson was attacked and pulled from his

car. He admitting having struck the victim several times with his fist and with the victim's shoe during the initial beating that occurred near his house. He told Gresham that McCune and Harmon put Jackson back into his car. Jackson was then driven to the dead end and dragged from his car. He further stated that, after McCune left the dead end, Harmon beat Jackson about the head and face with clay boulders and threw him into a mud puddle.

Later that day, Assistant State's Attorney George Smith of the felony-review unit, also interviewed Patterson. Patterson verified that he had signed and initialed the *Miranda* waiver form that Gresham had given him. He indicated that he understood his rights. Smith again advised Patterson of his *Miranda* rights and explained that he was assisting the police in the investigation of a murder and that he was not representing Patterson. Patterson indicated that he understood. He said that he had been treated well by the police, had been fed and had rested. He also told Smith that he was making the statement of his own free will and without having been threatened or promised anything. Patterson then gave Smith a detailed account of Jackson's murder.

Before trial, Patterson moved to suppres his statements and Thomas moved to sever his trial from Patterson's. The court denied both motions but later granted Thomas' motion *in limine*, instructing the State to refrain from using Thomas' name when introducing Patterson's statements and to eliminate all references to Thomas' being in the victim's car.

At trial, Officer Gresham testified regarding Patterson's arrest. He further testified concerning the statement that Patterson made after learning that he had been indicted. Assistant State's Attorney Smith also testified concerning Patterson's statement. Smith's testimony essentially corroborated Gresham's. In addition, Smith testified that Patterson told him that Harmon instructed

McCune to go get a knife. Patterson recalled telling Harmon and McCune that there was a knife at his house. He told Smith that McCune then drove Jackson's car away from the scene. Smith also testified that Patterson stated that he and Harmon then fled the scene together and Thomas ran off in a different direction. Thomas objected to Smith's testimony that Thomas was at the scene and fled. The court sustained his objection and instructed the jury to disregard the testimony insofar as it concerned Thomas.

Patterson neither testified nor presented any evidence at trial. Thomas, however, testified in his own defense. He admitted that he punched Jackson in the jaw once but denied participating in the beating that occurred near his house, getting into the victim's car and riding to the dead end. He testified that he stood on the sidewalk in front of his house and watched Jackson's car drive toward the dead end and stop. Thomas also testified that he then walked to the area where Jackson's car was parked, but stopped approximately 25 feet from the others. He testified that he saw Harmon "making downward motions * * * with his hands," but was unable to determine whether Harmon had an object in his hands. Finally, Thomas testified that he did not help, encourage or even say anything while he stood there.

Defendant Patterson contends that neither the admonitions required by *Miranda* under the fifth amendment nor his knowledge of the fact that he had been indicted for Jackson's murder afforded him sufficient information to knowingly and intelligently waive his sixth amendment right to counsel. Patterson also contends that this information was insufficient to enable him to knowingly and intelligently waive the right to counsel guaranteed by our State constitution (Ill. Const. 1970, art I, sec. 8). Consequently, he maintains that his uncounseled post-indictment statements to Officer Gresham and Assistant State's Attorney Smith were obtained in violation of both

his sixth amendment right to counsel and his right to counsel guaranteed by our State constitution.

Patterson correctly observes that the sixth amendment right to counsel and the right to have counsel present during interrogation which is guaranteed by *Miranda* to safeguard the accused's fifth amendment privilege against self-incrimination, are separate and distinct rights. (*People v. Martin* (1984), 102 Ill. 2d 412, 419, *cert. denied* (1984), 469 U.S. 935, 83 L. Ed. 2d 270, 105 S. Ct. 334). Consequently, he contends that *Miranda* warnings, which were fashioned to protect the accused's fifth amendment privilege, do not serve to create a sufficiently meaningful comprehension of the sixth amendment right to counsel. Absent such comprehension of all the facts necessary to an understanding of the sixth amendment right to counsel, he concludes that he could not have knowingly waived that right. Patterson urges this court to hold that the State must satisfy a higher burden to establish a knowing and intelligent waiver of the sixth amendment right to counsel than is necessary to establish a waiver of the right to counsel guaranteed by *Miranda*. This court recently rejected this argument in *People v. Owens* (1984), 102 Ill. 2d 88, *cert. denied* (1984), 469 U.S. 963, 83 L. Ed. 2d 297, 105 S. Ct. 361.

The defendant in *Owens* argued that a higher standard of waiver applies to the waiver of the sixth amendment right to counsel. This court first noted that the Supreme Court has expressly reserved ruling on the question of whether waivers of the sixth amendment right to counsel must be judged by a higher standard than that which is applicable to waivers of the right to counsel under *Miranda*. (*People v. Owens* (1984), 102 Ill. 2d 88, 102). The Supreme Court again reserved ruling on this question last term. (See *Michigan v. Jackson* (1986), 475 U.S. ——, —— n.10, 89 L. Ed. 2d 631, 642 n.10, 106 S. Ct. 1404, 1411 n.10.) The lower courts that have addressed this issue are not in agreement. See *People v. Owens*

(1984), 102 Ill. 2d 88, 102; see also 1 W. LaFave & J. Israel, Criminal Procedure sec. 6.4(f), at 472 (1984).

In *Owens*, the defendant was advised of his *Miranda* rights and signed a waiver of those rights prior to interrogation. Nevertheless, he argued that he could not have validly waived his sixth amendment right without knowledge of the fact that a criminal complaint charging him with murder had been filed. The court found that the defendant knew he was being held for questioning in connection with a murder. In concluding that the defendant validly waived his sixth amendment right to counsel, the court stated:

> "[H]e was aware of the severity of the situation facing him and, since he had been given his *Miranda* warnings, he knew he had the right to have an attorney present during questioning. Considering these facts, together with defendant's familiarity with the *Miranda* warnings, we have no doubt of the admissibility of the statements * * *." *People v. Owens* (1984), 102 Ill. 2d 88, 102-03.

Like the defendant in *Owens*, Patterson was aware of the gravity of his situation. After he was arrested on battery and mob-action charges, he was questioned concerning a murder. The record establishes that Patterson was informed of the fact that he had been indicted for murder before he gave his statements to Officer Gresham and Assistant State's Attorney Smith. Smith explained his role as an assistant State's Attorney by informing Patterson that he was not representing Patterson, but was assisting the police in a murder investigation. Patterson indicated that he understood.

We also believe that Patterson, like the defendant in *Owens*, understood his constitutional rights before he gave his statements. The record reveals that when Patterson began to talk to Officer Gresham, Gresham stopped him and gave him a *Miranda* waiver form. Thus, before

he gave his statement to Gresham, Patterson was informed that he had the right to remain silent and that if he chose to forgo that right, anything he said could and would be used against him in court. He was also informed that he had a right to have an attorney present during questioning. Before Assistant State's Attorney Smith interviewed Patterson, Patterson verified his signature and initials on the *Miranda* waiver form. Smith then advised Patterson of his *Miranda* rights again. Patterson indicated that he understood his rights and had no questions regarding them. We therefore conclude that, like the defendant in *Owens*, Patterson was aware of the gravity of his situation and that he understood his constitutional rights before he gave his statements to Officer Gresham and Assistant State's Attorney Smith. He therefore knowingly and intelligently waived his sixth amendment right to counsel.

We next address Thomas' argument that the trial court erred in denying his motion for severance. A defendant may request a severance if he believes that joinder of his case with that of a codefendant will result in prejudice. (Ill. Rev. Stat. 1985, ch. 38, par. 114-8.) In *People v. Bean* (1985), 109 Ill. 2d 80, 92, this court stated that "[a] defendant does not have an automatic right in Illinois to be tried separately from his codefendants simply because they were all charged in the same indictment for crimes arising from the same circumstances." Rather, defendants who are jointly indicted are to be jointly tried unless a separate trial is necessary to avoid prejudice to one of the defendants. (*People v. Olinger* (1986), 112 Ill. 2d 324, 345.) The decision whether to grant a separate trial is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v. Lee* (1981), 87 Ill. 2d 182, 186.

This court has recognized that prejudice may occur where a codefendant makes extrajudicial hearsay admis-

sions that inculpate the defendant. (*People v. Olinger* (1986), 112 Ill. 2d 324, 345; *People v. Daugherty* (1984), 102 Ill. 2d 533, 541.) The defendant may be denied his sixth amendment right to confrontation if the codefendant's hearsay admission is admitted against him and the codefendant does not testify. (*People v. Daugherty* (1984), 102 Ill. 2d 533, 541.) "Because the defendant cannot call the codefendant to the stand for cross-examination, either a separate trial should be ordered or the admission should be redacted to eliminate any references to the defendant." (*People v. Lee* (1981), 87 Ill. 2d 182 187; see also *Bruton v. United States* (1968), 391 U.S. 123, 134 n.10, 20 L. Ed. 2d 476, 484 n.10, 88 S. Ct. 1620, 1626-27 n.10; *People v. Clark* (1959), 17 Ill. 2d 486, 490.) In *Bruton*, the Supreme Court held that the confrontation clause is violated where there is a "substantial risk" that a jury, despite limiting instructions, looked to a nontestifying codefendant's extrajudicial statements in assessing the defendant's guilt. 391 U.S. 123, 126, 20 L. Ed. 2d 476, 479, 88 S. Ct. 1620, 1622.

Thomas maintains that he was prejudiced by the testimony of Officer Gresham and Assistant State's Attorney Smith concerning Patterson's statements. He argues that Patterson's statements, viewed in the context of the other evidence in this case, implicated him by implying that he was present at the scene of the murder. In support of his motion for severance, Thomas argued that, contrary to his own statement, Patterson's statements would place him in Jackson's car and at the scene where his body was found. Thomas' counsel admitted that Patterson's statement did not, however, indicate that Thomas struck Jackson while he was at the dead end. After reviewing summaries of both defendants' oral statements, the court noted that Thomas, by his own statement, implicitly placed himself at the scene when he told Assistant State's Attorney Friedman that McCune drove away from the park alone. Therefore, the court denied the motion for

severance. As stated earlier, however, the court granted Thomas' motion *in limine* and instructed the State to refrain from using Thomas' name when introducing Patterson's statements and to eliminate all references to Thomas' being in the victim's car.

Contrary to the court's ruling, however, Assistant State's Attorney Smith testified that Patterson told him that "Thomas ran off" from the scene of the murder. As noted earlier, the court immediately sustained Thomas' objection and instructed the jury to disregard the reference to Thomas. Smith's testimony placed Thomas at the murder scene. Nevertheless, we do not find that it prejudiced Thomas. First, the State introduced testimony concerning Thomas' own statement in which he placed himself at the scene. Assistant State's Attorney Friedman testified concerning his interview of Thomas. He testified that he confronted Thomas with McCune's statement that Thomas was at the canal with the victim when McCune left the area. Friedman testified that Thomas responded that that was true. Patterson's statements did not otherwise implicate Thomas. In addition, the court instructed the jury: "Mere presence or negative acquiescence is not sufficient to make a person accountable for the acts of another."

Moreover, unlike the prosecutor in *Bruton*, the State presented other evidence of Thomas' guilt. McCune testified that Thomas hit and kicked Jackson approximately 10 times during the initial attack near Thomas' house. Lequita Adams, an ex-girlfriend of Thomas' who lived across the street from him, testified that she saw him throw the first punch at the driver of Jackson's car. Lequita Adams' mother, Nancy Adams, also identified Thomas and testified that he participated in the beating that occurred near his house. In addition, the State presented the testimony of Roger Shirk, a forensic scientist, that footprints found in the mud near Jackson's body could have been made by the shoes taken from Thomas

shortly after he was arrested. Having reviewed the record, we find that Patterson's statements, as testified to by Officer Gresham and Assistant State's Attorney Smith, did not "add[] substantial, perhaps even critical, weight to the Government's case" against Thomas. (*Bruton v. United States* (1968), 391 U.S. 123, 127-28, 20 L. Ed. 2d 476, 480, 88 S. Ct. 1620, 1623.) We therefore conclude that the trial court did not abuse its discretion in denying Thomas' motion for severance.

The State filed a motion to strike Patterson's reply brief insofar as it alleges that his trial counsel was incompetent, or the alternative, for leave to file a response thereto. The State was granted leave to file a response, and the motion to strike was taken with the case. In support of its motion to strike, the State argues that Patterson first asserted that his trial counsel was incompetent in his reply brief in the appellate court. The appellate court did not address this issue.

As he did in the appellate court, Patterson first raised the question of his trial counsel's competence in this court in his reply brief. Our Rule 341(e), which sets forth detailed and comprehensive instructions concerning the contents of the appellant's brief, applies to criminal as well as civil appeals. (103 Ill. 2d R. 341(e); 87 Ill. 2d R. 612(i).) Rule 341(e)(7) expressly provides: "Points not argued are waived and shall not be raised in the reply brief." (103 Ill. 2d R. 341(e)(7).) Similarly, this court has held that an argument not raised in the initial brief is deemed waived for purposes of review. *Murdy v. Edgar* (1984), 103 Ill. 2d 384, 393.

Nonetheless, Patterson's counsel seeks to circumvent the rules and holdings of this court, contending that the issue of counsel's effectiveness is a proper matter for a reply brief. He relies on *People v. George* (1986), 140 Ill. App. 3d 1001, 1005, and *People v. Maxwell* (1980), 89 Ill. App. 3d 1101, 1104, as authority for his position. Our

Rule 341(g), however, clearly and specifically states: "The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee." (103 Ill. 2d R. 341(g).) Patterson's counsel's attempt to advance for the first time in this court the new issue of trial counsel's competence in the guise of a response to the State's waiver argument is in direct violation of this court's Rules 341(e)(7) and 341(g). We strongly disapprove of counsel's deliberate disregard for and attempt to circumvent this court's rules.

For the foregoing reasons, the State's motion to strike portions of Patterson's reply brief, which was taken with the case, is allowed; in cause No. 63144, the judgment of the appellate court is affirmed; and in cause No. 63149, the judgment of the appellate court is affirmed.

Motion allowed;
judgments affirmed.

JUSTICE GOLDENHERSH took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 86-7059

TYRONE PATTERSON,
Petitioner

v.

ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 13, 1987

PETITIONER'S

BRIEF

No. 86-7059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TYRONE PATTERSON,

Petitioner

v.

ILLINOIS,

Respondent

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Are mere admonishments under *Miranda* v. *Arizona* sufficient to assure that an indicted defendant knowingly and intelligently waives his sixth amendment right to the assistance of counsel at interrogations following that indictment?

LIST OF PARTIES TO THE PROCEEDINGS IN THE SUPREME COURT OF ILLINOIS

The following parties appeared in the proceedings in the Supreme Court of Illinois involving petitioner Patterson:

1. Petitioner Tyrone Patterson
2. Codefendant David Thomas
3. Respondent State of Illinois

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TABLE OF AUTHORITIES

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OPINIONS BELOW

The decision of the Illinois Appellate Court, First District, in this cause is reported as *People* v. *Patterson*, 140 Ill.App.3d 421, 488 N.E.2d 1283 (1986) and is set forth in the Joint Appendix at pages 26-35. The decision of the Illinois Supreme Court in this case is reported as *People* v. *David Thomas*, 116 Ill.2d 290, 507 N.E.2d 843 (1987) and is included in the Joint Appendix at pages 36-48.

JURISDICTION OF THE COURT

The jurisdiction of this Court is based on 28 U.S.C. section 1257(3). The opinion of the Illinois Appeliate Court was issued January 21, 1986 and leave to appeal was filed with the Supreme Court of Illinois on February 25, 1986. On June 3, 1986, the Illinois Supreme Court accepted the cause for review and consolidated it with his codefendant's appeal. On April 16, 1987, the Illinois Supreme Court delivered its decision and the petition for writ of certiorari was filed with this Court on June 12, 1987. This Court granted the petition by its ruling of October 13, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On August 21, 1983, the body of James Kevin Jackson was found in a puddle of water in an area of Evanston, Illinois near a sanitary district canal. (R. 421-2) Police investigation led to Tyrone Patterson (R. 716, 719-20) and he was arrested. (R. 720)

According to testimony at the pre-trial hearing on petitioner's motion to suppress his statements, Investigator Michael Gresham arrested Juan McCune and questioned him about the homicide. (R. 4-6) McCune implicated Patterson (R. 5-6) and Gresham arrested him on August 21, 1983. (J.A. 5, R. 6-7) Patterson was taken to the Evanston police station (R. 8-9) where he was interviewed by Gresham. (R. 10-11) When Gresham asked Patterson if he knew anything about the murder, Patterson made no statement about it (R. 12) except to say he knew nothing of it. (R. 33) Patterson was later placed in the facility lockup (R. 13), held on an arrest warrant for an unrelated offense. (R. 6-7, 38) Meanwhile, Gresham continued his investigation. (R. 16)

On August 22nd, Gresham returned to the police station and pursued the investigation. (R. 17) For the first

time, he contacted the Office of the Cook County State's Attorney. (R. 16, 17) Two assistants arrived at the station and conferred with Gresham. (R. 17-18) At that time, felony charges on the Jackson homicide were approved. (R. 18) Later that day, Patterson was brought from his cell to be told of the charges and to visit his family. (R. 18) He was thereafter returned to the lockup. (R. 19)

The following morning, August 23, 1983, Gresham proceeded to the criminal courthouse where he testified before the grand jury. (J.A. 5-6) The grand jury returned a true bill against Patterson and two others. (J.A. 6) Gresham then returned to the police station and, with his partner, met with petitioner Patterson. (J.A. 6)

At that time, Patterson was informed he had been indicted by the grand jury for murder and armed violence. In response, Patterson asked how many people had been indicted. Gresham told him 3 had been charged: himself (meaning Patterson), McCune and David Thomas. (J.A. 6; R. 54) To that, Patterson asked why Carl Harmon had not been indicted since Harmon had done everything and had made a statement to a girl named Dorisa that he (Harmon) had killed someone. (J.A. 6, 8; R. 53, 54, 55) At that point, Gresham told Patterson there had been no indictment returned for Harmon at that time. (R. 58) He stopped Patterson from continuing and "readvised him of his Miranda's." (J.A. 7; R. 58-60) He also gave Patterson a waiver to be signed. (R. 60)

In doing so, Gresham read the Miranda waiver aloud as Patterson read it as well. Patterson read each sentence of the warnings and, having done so, initialed each part. At the conclusion, he signed the form, as did Gresham and Gresham's partner. After Patterson signed the rights statement, Gresham told him to continue speaking and they conversed for 30 or 40 minutes. (J.A. 8)

Afterwards, Gresham contacted the felony review division of the State's Attorney's Office and assistant George Smith later arrived. (R. 23) Gresham told him about the case and Smith and Patterson then spoke. Gresham did not ask Patterson any additional questions. (R. 24).

According to Smith, Gresham brought Patterson to the interview room and left. (R. 73) Smith and Patterson were alone in the room. (J.A. 9) At that time, Smith was aware that Patterson had been formally charged by grand jury indictment. (R. 80-1)

Smith recalled he showed Patterson a form for waiving constitutional rights which contained Patterson's signature and initials. Upon being asked, Patterson expressed recognition of them and Smith asked him if he understood the document. Patterson replied that he did. Smith inquired if Patterson had any questions about it and Patterson responded he did not. Smith then read to Patterson the entire document and asked him again if he understood the rights. Patterson again said he did. Smith once more asked if Patterson had any questions and Patterson once more said that he did not. (J.A. 10) Smith explained his role and function to Patterson, which Patterson understood, and asked if Patterson wished to make a statement. Patterson answered he did and wanted to talk to tell the truth. (J.A. 11) So, Smith commenced a conversation with Patterson. (R. 77)

Over Patterson's testimony on the conditions under which he was confined (R. 122-8, 135-6) and his failure to be advised of his rights (R. 130, 131-2) so that he was forced to provide the statements (R. 137-9), the trial judge denied Patterson's motion to suppress his statements and ruled them admissible. (R. 168-9)

At Patterson's trial, both Gresham and Smith testified to the details of Patterson's remarks to them. (J.A. 14-15,

16-24) Other evidence was presented as well concerning the crime and the police investigation.

Testifying in exchange for a deal to avoid a murder charge (R. 527, 580, 607-8, 609-10, 613), Juan McCune related his knowledge of the crime. He explained he was testifying to the truth, which matched what he had earlier told police (R. 518, 559-61, 566-7, 568, 593, 598, 616), but admitted he had signed a motion to suppress his statements. According to the motion, McCune had made those statements from fear of torture and physical abuse (R. 600-1), he did not knowingly make statements since he was sleepy and under the influence of alcohol and drugs (R. 601-2), and the disclosures were not true in any manner. (R. 604) He discounted the motion as a way to get his statements suppressed (R. 617-18) but nevertheless agreed he lied under oath "because it well suited" his interests. (R. 620)

In his testimony, McCune explained he was at the home of David Thomas with petitioner Patterson and Carl Harmon. (R. 505-7) There, they saw James Kevin Jackson (the victim) drive by. McCune heard Harmon tell the others to spread out as he did not know who it was. (R. 509) McCune related Jackson backed up and Harmon called out to him, running to the car where he opened the door, turned off the engine, and pulled out the key. Harmon began hitting Jackson, whereupon McCune and Thomas ran to the car and started hitting him as well. McCune described Patterson as in the back seat hitting him too. (R. 509-10) Harmon pulled Jackson from the car and kicked him and hit him while Patterson struck Jackson with a shoe 2 or 3 times and Thomas kicked and hit him. (R. 511-12)

State witnesses Nancy and Lequita Adams testified to their observations of the beating. (R. 625-30, 655-67)

Each was familiar with Patterson from the neighborhood but neither saw Patterson involved in the scuffle. (R. 645-6, 672-3)

According to McCune, Jackson and the others got in the car and left, with McCune driving. (R. 512-13, 544-5) They proceed towards the canal until McCune stopped the car and, as instructed, turned out the lights. (R. 513) They all got out, with Patterson and Harmon pushing Jackson through the passenger side door. Harmon then grabbed Jackson and dragged him to the water. (R. 513) There, Harmon screamed at Jackson (R. 513, 515-16) and Thomas said to throw him in the water. Patterson told McCune to get a knife and McCune drove off. (R. 516) After doing so, he did not return. (R. 516-17)

After the victim's body was discovered (R. 421-2), police located footprints around the pool. (R. 422) Those impressions were photographed and measured (R. 423-4) and were compared to shoes taken from Patterson. (R. 877-83) It was determined Patterson's shoes could not have caused any of the shoeprints. (R. 883, 897) When the victim's car was spotted (R. 687), it was processed for fingerprints. (R. 697, 699, 709, 710, 711, 713) After comparison, none of the discovered fingerprints were matched to Patterson. (R. 898-900)

Following the State's evidence, Patterson rested without presenting any proof. (R. 1017) The jury thereafter convicted Patterson of murder (R. 1158) and he was subsequently sentenced to a term of 24 years in prison. (R. 1196)

On appeal to the Illinois Appellate Court, Patterson's conviction was affirmed over his contention his statements were inadmissible since the State, through mere reliance on *Miranda* warnings, did not establish a knowing and intelligent surrender of the sixth amendment right to counsel applicable to the interrogation after his indictment. (J.A. 28-30)

In the Illinois Supreme Court, Patterson again argued he could not have knowingly and intelligently waived his right to sixth amendment counsel at questioning following indictment by merely receiving admonishments conforming to *Miranda* v. *Arizona* and, so, his statements were not admissible at trial. Again, the reviewing court disagreed and held the disclosures were properly received. (J.A. 41-44) Consequently, the Illinois Supreme Court, too, upheld the conviction rather than ordering retrial without State use of post-indictment statements.

SUMMARY OF THE ARGUMENT

The constitutional right to counsel under the sixth amendment to the United States Constitution, applicable to the States through the due process clause of the fourteenth amendment, comes to life whenever the prosecutorial forces initiate adversary criminal proceedings. Such a process commences, as in Patterson's case, with the return of a grand jury indictment. Unlike its position prior to the indictment, when criminal prosecution is a mere potentiality, the State becomes committed, by the charges, to prosecuting the accused. By the government's own choice, the indictment solidifies the adverse positions of the State and defendant and, thereby, necessarily involves the accused in the legal system. That was what happened to petitioner here.

Having been indicted and, thus, facing the clear possibility of criminal conviction and penal incarceration, Patterson confronted the organized prosecutorial forces of society and the intricacies of the criminal justice system in his interviews with authorities. At the critical stages of

the proceedings following the indictment, this Court has wisely extended to citizens like him the constitutional right to counsel.

As this Court has sensibly recognized, as much as at trial itself, charged citizens need the assistance of counsel at certain settings after their indictment. For, in effect, events at those stages could seal the defendant's fate and make the trial itself, despite the need for effective counsel therein, a mere formality. Occurrences prior to trial could further undermine all the trial protections established in the constitution. It does little good to assure the highest caliber of assistance of counsel at trial if, through the unwitting absence of counsel at a significant post-indictment event, the trial becomes a fore-ordained sham. Therefore, to meaningfully protect the defendant's constitutional right to counsel at trial, and to thereby enable counsel to protect defendant's critical trial rights, it is essential the defendant's pre-trial sixth amendment right to counsel be preserved. Given the ramifications from a loss of counsel's assistance at critical post-indictment confrontations such as interrogations, this Court must assure that that right to counsel is not easily surrendered.

The standard held applicable by this Court to the valid waiver of such critical rights as the constitutional right to counsel has been a "knowing and intelligent" surrender. If the accused is fully aware of the right to be lost and chooses with complete knowledge of the facts to forego reliance on it, he must suffer the consequences, be it conviction and jail. To the same extent, however, that he be held accountable for the intelligent surrender of a known right, he cannot be penalized for unwittingly waiving a protection about which he was not fully aware. A system which permits and, indeed, rewards the surrender of a critical but unknown right deserves no endorsement by this Court. Yet this is the scheme which operated in Patterson's case.

The constitutional right to counsel has been extended without fail by this Court to post-indictment questioning sessions. Clearly, such interrogations by authorities are as equally perilous to the accused as the upcoming trial itself and, therefore, the need for counsel is equally as great. Certainly, the governmental interrogation following indictment by an entity committed to prosecute is an occurrence where results will easily transform a criminal trial into a shallow charade. The right under the constitution to counsel at such confrontations with the prosecution, therefore, cannot lightly be lost. While, indeed, this significant sixth amendment right can be surrendered, it becomes too easily cast away, without the required full awareness of its nature, if the accused is merely informed, as here, of his fifth amendment right to counsel through admonishments conforming to *Miranda* v. *Arizona*.

This Court created the set of advice, including reference to the right to counsel, in the *Miranda* case specifically to protect the fifth amendment privilege against self-incrimination. That allusion to counsel, therefore, has the limited function (as intended by this Court) of informing an arrested citizen of counsel in the narrow context of this fifth amendment right. The holding in *Miranda* requiring advice on counsel applies only to custodial interrogations prior to indictment and, as such, was not intended to alert the accused to this sixth amendment right to counsel after the filing of criminal charges. The advice in *Miranda* simply does not adequately describe to indicted citizens their right to counsel automatically attaching by virtue of the initiation of adversary proceedings.

In *Miranda*, this Court judicially created both the fifth amendment right to counsel and the simple method of waiving it. By contrast, the right to counsel under the sixth amendment is contained within the constitutional provision itself. It therefore stands as a higher, permanent right to counsel, subject to removal only through an amendment to the constitution itself. The judicially conceived fifth amendment right to counsel drafted in *Miranda*, by comparison, may be wholly discarded through majority rule of 5 members of this Court. Moreover, the right to counsel under the fifth amendment must be specifically invoked to be applicable, unlike the automatic right to counsel under the sixth amendment which arises without demand. Such distinctions between the fifth and sixth amendment rights to counsel vividly illustrate the natural and undeniable distinctions in the applicable procedures for waiving them. Admonishments judicially devised in *Miranda* for the loss of the right to counsel therein created simply cannot be extended to equally permit an effective surrender of the intrinsic right to counsel expressly contained in the sixth amendment. Since Patterson here received no greater explanation of his sixth amendment right to counsel than the mere statement of his fifth amendment right to counsel in the *Miranda* admonishments, he did not knowingly and intelligently waive his post-indictment right to counsel assistance.

When questioned by Gresham and later by Smith after the indictment (both of whom knew of Patterson's charges), Patterson simply received the standard *Miranda* warnings. He thereby effectively waived only his fifth amendment right to counsel. As Patterson's critical sixth amendment right to counsel had attached as well (automatically by virtue of the State's own action in secur-

ing the indictment and without any act on Patterson's part), the government was additionally required to show an intelligent waiver of that known right. It simply did not do so. As a result, Patterson's disclosures to both Gresham and Smith were obtained without a valid waiver of counsel and were not admissible against him at trial. That is the holding now compelled by the law and the facts.

While that decision satisfactorily concludes this case, there remains unresolved the appropriate procedures for validly waiving sixth amendment counsel after indictment at interrogating sessions before the appointment or retention of counsel. To govern that situation, procedures endorsed previously by this Court in like circumstances are necessary.

When the right to counsel has been invoked by the accused, either before or after his being indicted, this Court has forbidden interrogation unless the contact with authorities is initiated by the accused. In cases such as that of Patterson here, indicted before the interrogation, the right to counsel has been equally invoked by the simple filing of those charges. Therefore, there would equally be no right to question the indicted citizen unless he voluntarily initiates a dialogue with authorities.

ARGUMENT

AS THE SIXTH AMENDMENT RIGHT TO COUNSEL WHICH ATTACHES UPON INDICTMENT IS CONSTITUTIONALLY DESIGNED FOR GREATER PURPOSES THAN THE JUDICIALLY CREATED FIFTH AMENDMENT RIGHT TO COUNSEL, IT MAY VALIDLY BE SURRENDERED ONLY UPON A SHOWING OF A KNOWING AND INTELLIGENT WAIVER, WHICH IS NOT SECURED THROUGH ADMONISHMENTS REQUIRED BY *MIRANDA* V. *ARIZONA*

Petitioner Patterson urges this Court to conclude that, upon examining the critical constitutional purposes of the

sixth amendment right to counsel and its broader scope than the fifth amendment right to counsel conceived by this Court in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the post-indictment right to legal assistance may only be lost after an intelligent waiver of a known right. This Court should further determine that advice as expressed in *Miranda* on the fifth amendment right to counsel does not provide meaningful comprehension of the sixth amendment right to counsel and, so, does not yield the required effective waiver. It should therefore hold Patterson did not genuinely waive his right to counsel at the two interrogations after his indictment and, therefore, deserves retrial without the inadmissible statements.

A. Nature Of The Sixth Amendment Right To Counsel

1. Because Of The Initiation Of Adversary Criminal Proceedings Signalled By The Indictment, Petitioner Possessed A Federal Constitutional Right To The Assistance Of Counsel At Interrogations After Indictment

Petitioner Patterson in this case was indicted on charges of murder and armed violence based on murder by a Cook County, Illinois grand jury on August 23, 1983. (J.A. 5-6) When he was thereafter questioned about those charges by Investigator Gresham and then by assistant Cook County State's Attorney Smith, he enjoyed, as recognized by this Court, a federal constitutional right to the assistance of counsel.

Through the sixth and fourteenth amendments of the federal constitution, an accused like Patterson in a state court system is assured the benefits of counsel in his behalf. That right applies from the onset of adversary proceedings, such as the indictment here, and therefore was effective at Patterson's interrogations.

The need for counsel prior to trial itself has often been recognized by this Court. In *United States* v. *Wade*, 388 U.S. 218 (1967), the Court reviewed the origins of the right to counsel (388 U.S. at 223-5) but considered that, in the modern world, that constitutional protection cannot be restricted solely to trial events. Therein, it was stressed

> "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." (388 U.S. 218 at 224)

So, the sixth amendment right to counsel was construed "to apply to 'critical' stages of the proceedings", to provide for "counsel's assistance whenever necessary to assure a meaningful 'defence.'" *(Wade*, 388 U.S. 218 at 224, 225)

In so evaluating sixth amendment counsel, this Court in *Maine* v. *Moulton*, 474 U.S. ___, 88 L.Ed.2d 481 (1985) likewise acknowledged it had

> "recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." (88 L.Ed.2d at 492)

Determining the right to counsel was shaped by the need for counsel, this Court agreed "the right attaches at earlier, 'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" *(Moulton*, 88 L.Ed.2d at 492)

And in *United States* v. *Ash*, 413 U.S. 300 (1973), this Court explained the extension of counsel was based on the recognition "that 'Assistance' would be less than mean-

ingful if it were limited to the formal trial itself." (413 U.S. at 310) In that regard, it stressed

> "This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *(Ash*, 413 U.S. 300 at 310)

These views and the similar holdings in *Wade* were thereafter reasserted by this Court in *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) to account for the application of sixth amendment counsel to pretrial settings.

The point at which such "critical" stages begin has been described by this Court as "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *(Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972); *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977)) Such commencement of judicial proceedings "is far from a mere formalism" but "is the starting point of our whole system of adversary criminal justice." *(Kirby*, 406 U.S. at 689) At and after that event, "the right to counsel granted by the Sixth Amendment means that a person is entitled to the help of a lawyer". *(Estelle* v. *Smith*, 451 U.S. 454, 469 (1981)) Consequently, once a citizen is indicted, he is entitled to the aid of counsel under the sixth (and fourteenth) amendment at subsequent "critical" stages of his case.

This Court has consistently deemed interrogation by authorities as such a "critical" stage of proceedings that the post-indictment right to counsel applies.

In *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court considered a defendant who had been questioned without counsel after indictment. It found the statements inadmissible, relying on the holding in *Spano* v. *New York*, 360 U.S. 315 (1959) that interrogation after indictment occurs "at a time when he was clearly entitled to a lawyer's help." (377 U.S. 201 at 204) In the explanation of why the right to counsel applied, it was noted

> "a Constitution which guarantees a defendant the aid of counsel at . . . trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *(Massiah*, 377 U.S. at 204 citing *Spano*, 360 U.S. at 326 (Douglas, J., concurring); see also *Maine* v. *Moulton*, 88 L.Ed.2d 481, 493)

The *Massiah* holding accepting the extension of the sixth amendment right to counsel to post-indictment interrogation has been regularly and routinely followed by this Court. (See *McLeod* v. *Ohio*, 381 U.S. 356 (1965) reversing a state court decision approving the use of statements gained in the absence of counsel after indictment and before arraignment; *Brewer* v. *Williams* agreeing that "once adversary proceedings have commenced against an individual he has a right to legal representation when the government interrogates him" (430 U.S. 387 at 401); *Maine* v. *Moulton* finding as violative of Moulton's sixth amendment right to counsel questioning by an undercover informant in the absence of counsel after indictment; *United States* v. *Henry*, 447 U.S. 264 (1980) determining infringement of the sixth amendment guarantee of the assistance of counsel when statements were made without the presence of counsel to a government informant following indictment.)

In Patterson's case, his right to the assistance of counsel under the sixth and fourteenth amendments clearly arose by the act of the State in indicting him and thereby initiating adversary criminal proceedings. Therefore, under the clear law of this Court, he was entitled to counsel at the two post-indictment interrogation sessions. Such counsel, as has been recognized by this Court, serves crucial purposes essential to the functioning of a fair and constitutional criminal justice system.

2. Since, At Interrogations Following Indictment, The Accused Is Confronted By His Adversary Committed To Prosecute Rather Than Investigate While Facing The Intricacies Of The Criminal Justice System, The Recognized Right To Counsel Is Of Paramount Importance

The sixth amendment right to counsel recognized as applying to post-indictment interrogations is deemed of significant importance to the protection of the accused's broad trial rights. At those sessions, the defendant faces the prosecutorial forces of organized society in the form of government officials committed to prosecute rather than simply investigate the crime. He further finds himself, unlike preindictment settings, involved in the substantive and procedural intricacies of the criminal justice system. To more effectively meet his adversary and protect his rights in that system, counsel extended to the indicted citizen is highly crucial.

In assessing the situation facing an indicted individual, this Court recognized in *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) that only after indictment has "the government . . . committed itself to prosecute and only then that the adverse positions of government and defendant have solidified." Afterwards, "a defendant finds himself faced with the prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural

criminal law." The determination by this Court that the charged accused, unlike prior to indictment, occupies a position now adverse to a government determined to incarcerate him through an intricate legal system likewise has appeared in later decisions of this Court. (*United States* v. *Gouveia*, 467 U.S. 180, 189; *Maine* v. *Moulton*, 88 L.Ed.2d 481, 492; see also *Moran* v. *Burbine*, 475 U.S. ___, 89 L.Ed.2d 410, 428 (1986)) With this recognition, the tremendous importance of the right to counsel becomes clear.

At post-indictment interrogations, "the accused was confronted, just as at trial" by the system and his committed adversary and, therefore, the session is considered part of the trial. (*United States* v. *Ash*, 413 U.S. 300, 310) Counsel there serves the same function as at trial, to be "spokesman for, or advisor to, the accused." (*Ash*, 413 U.S. at 312) As at trial itself, "the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor" (*Gouveia*, 467 U.S. 180 at 190), protect him because the "average defendant does not have the professional legal skill to protect himself". (*Gouveia*, 467 U.S. at 189)

In *Ash*, this Court emphasized

> "an unaided layman had little skill in arguing the law or coping with an intricate procedural system. The function of counsel as a guide through complex legal technicalities long has been recognized by this Court." (413 U.S. 300 at 307)

As *Ash* suggests, without counsel, "the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary." (413 U.S. at 317) The meaning of the sixth amendment right to counsel is that "the accused shall not be left to his own devices in facing the '"prosecutorial forces of organized society"'"

(*Moran* v. *Burbine*, 89 L.Ed.2d 410 at 427) and assures "the 'guiding hand of counsel' is available to those in need of its assistance". *Ash*, 413 U.S. 300 at 308) The constitution guarantees to the accused under indictment "the right to rely on counsel as a 'medium' between him and the State." (*Maine* v. *Moulton*, 88 L.Ed.2d 481 at 496)

As this Court has declared, counsel safeguards all rights of the accused:

> "The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice. Embodying 'a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself,' [*Johnson* v. *Zerbst*], the right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding." (*Maine* v. *Moulton*, 88 L.Ed.2d 481 at 491)

This Court has sensibly accepted "the unique role the lawyer plays in the adversary system of criminal justice in this country." For all, the lawyer is the one person to whom our society looks as the protector of the legal rights of citizens in their dealings with police. (*Fare* v. *Michael C.*, 442 U.S. 707, 719 (1979)) In short, "the attorney plays a vital role in the administration of criminal justice under our Constitution." (*Fare*, 442 U.S. at 722) His functions prior to trial have been accepted as significant.

This Court has adhered to the

> "principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." (*United States* v. *Wade*, 388 U.S. 218, 226)

In doing so, it agrees that "the presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution." (*Wade*, 388 U.S. at 227) The needs of citizens experiencing interrogation after indictment vividly demonstrate the critical nature of their sixth amendment right to counsel.

Upon indictment, "the government's role shifts from investigation to accusation" (*Moran* v. *Burbine*, 89 L.Ed.2d 410, 427)) and "a person who had previously been just a 'suspect' has become an 'accused' within the meaning of the Sixth Amendment". (*Michigan* v. *Jackson*, 475 U.S. ___, 89 L.Ed.2d 631, 639-40 (1986)) Thus, whenever "the government crosses the line from the investigatory to the accusatory stage", unlike sessions prior to charge, "the purpose of the police in interrogating the defendant is not merely to investigate but 'to establish the guilt of the accused.'" (*United States* v. *Brown*, 699 F.2d 585, 589 (2nd Cir. 1983)) Following indictment, "any questioning of the defendant can only be 'for the purpose of buttressing . . . a prima facie case.'" (*United States* v. *Mohabir*, 624 F.2d 1140, 1148 (2nd Cir. 1980)) For this reason, at interrogating sessions after accusation, as opposed to those before the charges, both the seriousness of the situation and the citizen's need for counsel are heightened. The great need for and importance of counsel after indictment is to fully protect the entirety of the accused's trial rights from inadvertent loss by a misguided willingness to confess.

At interrogations after indictment there is little to be gained by confession (see *Mohabir*, 624 F.2d 1140, 1149 quoting *United States* v. *Satterfield*, 417 F.Supp. 293, 296 (S.D.N.Y. 1976) aff'd 558 F.2d 655 (2nd Cir. 1976); *United*

States ex rel Johnson v. *Lane*, 573 F.Supp. 967, 975 (N.D. Ill. 1983)) and much to be lost. Such admissions would effectively make "the trial no more than an appeal from the interrogation" and the right to counsel at trial "a very hollow thing" since "for all practical purposes, the conviction is already assured by pretrial examination". Without protecting the equally critical right to pre-trial counsel,

> "One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial.'" *(Wade*, 388 U.S. 218 at 226; *Escobedo* v. *Illinois*, 378 U.S. 478, 488 (1964))

Thus, sixth amendment counsel prior to trial is deemed "of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation" *(Michigan* v. *Jackson*, 89 L.Ed.2d 631 at 640) for the same reason it is essential at trial: "to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" *(Moran* v. *Burbine*, 89 L.Ed.2d 410 at 427) It is equally necessary, to assure this testing, to provide counsel at critical stages after indictment such as interrogations as it is at trial itself. In fact, this Court has determined the absence of counsel prior to trial at sessions where needed "may be more damaging" to the accused than denial at the trial. *(Maine* v. *Moulton*, 88 L.Ed.2d 481 at 492) This certainly indicates the extremely high regard extended to sixth amendment counsel by this Court.

Intended to protect all of the indicted citizen's rights, counsel's function at pre-trial interrogations is, therefore, significantly greater than the more limited role recognized under fifth amendment counsel applicable prior to indictment.

3. Serving The Greater Purpose Of Protecting All Constitutional Rights And Being Constitutionally Based, The Sixth Amendment Right To Counsel Is A Higher Right Than The Fifth Amendment Right To Counsel

As thus revealed through holdings of this Court, the post-indictment right to counsel under the sixth amendment is recognized as supremely important to protect all rights of the accused in his involvement with his adversary in the criminal justice system. Thus established, and being constitutionally compelled, this right is higher than the mere judicially created fifth amendment right to counsel. The Illinois Supreme Courts' holding that *Miranda* warnings fully protect Sixth Amendment rights clearly violates these constitutional principles.

Unlike the fifth amendment which contains absolutely no reference to a right to counsel, the sixth amendment particularly provides the indicted citizen shall enjoy the assistance of counsel. The fifth amendment right to counsel was judicially enacted by this Court in *Miranda* v. *Arizona*, for the limited and narrow purpose of protecting solely the fifth amendment privilege against self-incrimination and only when jeopardized through the technique of custodial interrogation. Distinctions between the two rights to counsel have been drawn, with the sixth amendment right consistently recognized as being the superior.

In *Rhode Island* v. *Innis*, 446 U.S. 291, 300 n. 4 (1980), this Court accepted a distinction between the right to counsel based on the sixth amendment and the right to counsel premised on the fifth amendment "as interpreted in the Miranda opinion." In *Michigan* v. *Jackson*, it reiterated such a distinction, while characterizing it as "subtle". (89 L.Ed.2d 631 at 641 n. 7)

The *Miranda* right to counsel has been described as merely "a prophylactic means of safeguarding Fifth Amendment rights" *(Doyle* v. *Ohio*, 426 U.S. 610, 617 (1976)) and as one of the "procedural safeguards . . . not themselves rights protected by the Constitution" but designed "to insure that the right against compulsory self-incrimination was protected." *(Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974)) This Court acknowledged in *United States* v. *Gouveia*, 467 U.S. 180, 188 n. 5 that counsel was provided in *Miranda* simply "to protect the Fifth Amendment privilege against self-incrimination rather than to vindicate the Sixth Amendment right to counsel." It likewise explained the differing purposes in *Kirby* v. *Illinois*, 406 U.S. 682, 689 and *New York* v. *Quarles*, 467 U.S. 649 (1984) later quoted in *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985) and *Moran* v. *Burbine*, 89 L.Ed.2d 410, 423.

Thus, it is clear significant distinctions must be drawn between the right to counsel under the fifth amendment which applies prior to indictment under *Miranda* when the accused is subject to custodial interrogation and the right to counsel applicable under the sixth amendment after indictment. The fifth amendment right, not contained in the constitution itself, is deemed operative only when invoked by the defendant. The sixth amendment right, being constitutionally grounded, is considered automatically in effect as soon as an indictment is secured without any specific request by the accused. (See *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962); *Brewer* v. *Williams*, 430 U.S. 387, 404) Moreover, the fifth amendment right to counsel exists only when police undertake "custodial interrogation" whereas no such limits exist on the operation of the right to counsel at interrogations after indictment.

It plainly emerges from the holdings of this Court that it intended the right to counsel under the sixth amendment at interrogations after indictment to be greater than any right to counsel under the fifth amendment. It equally must appear then that, as the rights to counsel are different, so, too, must be the waiver of those rights. As the sixth amendment right is far superior to that of the fifth amendment right, its surrender must be more closely scrutinized for inadvertent loss. The greater the right the greater the loss from a waiver of that right and, therefore, the more difficult the waiver should be. The law demands that more be required to waive the greater right to counsel under the sixth amendment at post-indictment interrogations than merely adhering to *Miranda* as done here. For, *Miranda* admonishments do not convey to the indicted citizen sufficient knowledge of his right to counsel to permit, as is necessary for a valid surrender, an intelligent relinquishment of that right.

B. Nature Of The Waiver Of The Sixth Amendment Right To Counsel

1. As With Other Crucial Constitutional Rights, The Waiver Of The Sixth Amendment Right To Counsel Must Be Knowing And Intelligent

Since petitioner Patterson here was called upon at both interrogations to forego his consitututional right to counsel, it was necessary the State establish a knowing and intelligent waiver of that right. This Court has repeatedly stressed that no less of a waiver is permissible for an effective surrender of such a right.

Thus, *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981), this Court stressed it was:

> "reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also

> constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege."

It repeated the conclusions from *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973) that "the right to counsel was a prime example of those rights requiring the special protection of the knowing and intelligent waiver standard." *(Edwards*, 451 U.S. at 483)

In *Schneckloth*, this Court analyzed the waiver standards (412 U.S. at 236-40) and, for surrender of counsel, adopted the "knowing and intelligent" theory of *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). It there noted that "guarantees afforded a criminal defendant at trial also protect him at certain stages before the actual trial and any alleged waiver must meet the strict standard of an intentional relinquishment of a 'known' right." (412 U.S. 218 at 238) The purpose of requiring such a knowing and intelligent waiver was well expressed in *Schneckloth:*

> "The Constitution requires that every effort be made to see to it that a defendant in a criminal case has not unknowingly relinquished the basic protections that the Framers thought indispensable to a fair trial." (412 U.S. at 242)

It is this determination to protect the easy loss of valued rights, such as the critical sixth amendment right to counsel, which has guided this Court in its evaluaion of waivers.

Consequently, in *Brewer* v. *Williams*, 430 U.S. 387, this Court held the standard of waiver under federal constitutional law made it "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" (430 U.S. at 404) It similarly stated such a "strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a

critical stage of pre-trial proceedings." (430 U.S. 387 at 404)

In *Moran* v. *Burbine*, this Court concluded "the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." (89 L.Ed.2d at 421)

And in *Estelle* v. *Smith*, 451 U.S. 454 (1981), this Court again determined

> "Waivers of the assistance of counsel . . . 'must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege'". (451 U.S. at 471 n.16)

To achieve such an intelligent surrender of a known right requires awareness by the accused of the right.

In *Estelle*, this Court explained awareness of the privilege and the consequences of foregoing it were prerequisites for the intelligent decision of its exercise. (451 U.S. 454 at 467) In *Moran*, it was deemed essential to provide knowledge to permit an understanding of the nature of the right and the consequences of abandoning it. (89 L.Ed.2d 410 at 422) And in *Faretta* v. *California*, 422 U.S. 806 (1975), this Court established the need, to secure a waiver of counsel at trial, for the accused to know what he was doing and was acting "with eyes open". (422 U.S. at 835) Only with knowledge of the right will the waiver be intelligent. Anything less is simply not a waiver. (See *Carnley* v. *Cochran*, 369 U.S. 506, 516.)

This Court indulges every reasonable presumption against waiver of basic constitutional rights *(Brewer*, 430 U.S. 387, 404; *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966)) such as the sixth amendment right to counsel *(Von Moltke* v. *Gillies*, 332 U.S. 708, 723 (1948)) and resolves all doubts in favor of protecting the right. *(Michigan* v. *Jackson*, 89

L.Ed.2d 631, 640) The presumption protecting the right to counsel was not overcome here by the State with proof it adequately alerted the accused to the right being waived so as to permit the conclusion its loss was knowing and intelligent. That standard of waiver is simply not met in the loss of the sixth amendment right to counsel by mere use of admonishments under *Miranda*.

2. Comprehension Of The Highly Critical Constitutional Right To Counsel At Post-Indictment Interrogations, By Which To Establish Effective Waiver, Is Not Achieved Merely By Use Of *Miranda* Admonishments

Although, as demonstrated, petitioner Patterson possessed the critical sixth amendment right to the assistance of counsel at his post-indictment interrogations, he was twice questioned in the absence of that counsel. Unless shown validly waived by the State, the absence of counsel renders the statements inadmissible at trial. (*Massiah* v. *United States*, 377 U.S. 201 (1964); *United States* v. *Henry*, 447 U.S. 264 (1980); *Maine* v. *Moulton*, 474 U.S. ___, 88 L.Ed.2d 481 (1985)) Advice under *Miranda* is not enough to provide knowledge of the sixth amendment right to counsel in order to thereby assure an intelligent waiver. On this point, courts and commentators have rejected the use of *Miranda* admonishments as insufficient to produce a valid surrender of the sixth amendment right to counsel.

In his detailed analysis of the issue of counsel waiver, the author of *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers*, 60 B.U.L.Rev. 738 (1980) (hereafter *Standards)* agreed

> "The important parallels between the sixth amendment pretrial right to counsel and right to counsel at trial suggest that similar particular waiver standards should also apply. The accused who waives

> counsel at critical pretrial stages relinquishes many of the same benefits as the defendant who chooses to proceed pro se at trial. Since at trial a comprehensive examination by the judge is necessary to ensure that the defendant's comprehension of his right to counsel is sufficient, it cannot be concluded that at pretrial stages the perfunctory reading of *Miranda* warnings conveys to the accused the difficulty of conducting a defense or an understanding of the importance of professional training in a complex area." (60 B.U.L.Rev. at 760; footnotes omitted)

Thus, since the underlying justification for extending the sixth amendment right to counsel to post-indictment interrogations is the firm belief that such events are as critical to the outcome of the case as the trial itself, comprehension of the right to counsel cannot be based on advice insufficient to comprehend the right to counsel at trial. In order to assure that citizens interrogated after indictment truly comprehend their sixth amendment right to counsel, it is essential the State be held to a higher burden of proof in establishing waiver of counsel after indictment than exists for waiver of counsel before indictment.

In *Standards*, the author stresses "the government bears a heavier burden with respect to waiver of the sixth amendment right". (60 B.U.L.Rev. at 747) As at trial, the "stringent comprehension standard for waiver of the right to counsel" equally applies. In both settings, there exists "the need to provide greater protection for the right to counsel and the other sixth amendment rights it helps secure". (60 B.U.L.Rev. 738 at 760-1; footnotes omitted)

Equally, in *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 Col.L.Rev. 363 (1982) (hereafter *Requirements*), the author emphasizes "the state should be subject to a greater burden in estab-

lishing relinquishment of the more important sixth amendment right than in establishing relinquishment of the fifth amendment right" (82 Col.L.Rev. at 373) and "the broader purposes and protections of the sixth amendment right require that the state be subject to a greater burden to establish a 'knowing and intelligent' waiver by the accused." (82 Col.L.Rev. at 386, n. 157) To assure that the "broader and more important protections are not illusory, the sixth amendment right should be more difficult to waive than the fifth amendment right." (82 Col.L.Rev. 363 at 375)

Courts are likewise in agreement on the greater burden on the government to show waiver of the sixth amendment post-indictment right to counsel.

In *United States* v. *Satterfield*, 558 F.2d 655, 657 (2nd Cir. 1976), the court agreed with the district court that there was a "higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached." In *United States* v. *Mohabir*, 624 F.2d 1140 (2nd Cir. 1980), the court proclaimed that "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights" (624 F.2d at 1146) under "the 'higher standard' . . . adopted in the Sixth Amendment context". (624 F.2d at 1151) In *United States* v. *Miller*, 432 F.Supp. 382, 388 (E.D.N.Y 1977) aff'd *United States* v. *Fernandez*, 573 F.2d 1297 (2nd Cir. 1978), the court accepted "the higher standard of waiver implicit within the Sixth Amendment". And in *United States* v. *Callabrass*, 458 F.Supp. 964, 967 (D.C.N.Y. 1978), the court equally recognized the "higher standard" applicable for sixth amendment waiver.

To satisfy this burden, the State must do more than provide *Miranda* warnings.

In *Mohabir*, the court determined the heavy burden of showing counsel waiver cannot be discharged "by merely showing that the accused made his statements after appropriate *Miranda* warnings were given." (624 F.2d 1140 at 1148) In *United States ex rel Johnson* v. *Lane*, 573 F.Supp. 967 (N.D.Ill. 1983), the court surveyed the law and decided there were persuasive reasons for requiring more extensive warnings before waiver of the sixth amendment right to counsel will be found. And in *United States* v. *Brown*, 699 F.2d 585 (2nd Cir. 1983), the court decided that, in meeting the "heavy burden" of proving waiver, *Miranda* warnings "do not suffice to meet the 'higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached'". (699 F.2d at 589) As concluded by the analyst in *Standards*, the State's burden simply "is not met by the mere showing that the accused was given *Miranda* warnings, with or without the additional warning as to the existence of a pending indictment." (60 B.U.L.Rev. 738 at 763)

The decisions of this Court equally suggest that, given the critical importance recognized in the sixth amendment right to counsel, it will not tolerate waiver of that right by mere *Miranda* warnings. Rather, it expects the State to show the indicted citizen knew fully of the constitutional right to counsel and was thereby able to intelligently forego it. *Miranda* admonishments cannot serve to create a meaningful comprehension of the sixth amendment right to counsel applicable after indictment and, so, cannot serve to create an effective waiver.

Considering the vast contrast between what petitioner Patterson needed to know to make an intelligent surrender of his sixth amendment right to counsel and the meager advice he was actually given, it is clear the State

did not sustain its heavy burden of proving an intelligent relinquishment of a known right. Petitioner lacked an appreciation of essential information necessary to an understanding of his post-indictment right to counsel. Therefore, he could not effectively waive that right and this Court must now so hold. Concluding mere *Miranda* warnings do not assure a knowing and intelligent waiver of the sixth amendment right to counsel at interrogations after indictment, this Court should order petitioner's convictions reversed and a new trial held.

3. To Insure Adequate Protection Of The Sixth Amendment Right To Counsel, The Interrogation Must Be Initiated By The Accused.

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), *Michigan* v. *Jackson*, 475 U.S. ___, 89 L.Ed.2d 631 (1986) and *Smith* v. *Illinois*, 469 U.S. 91 (1984), this Court barred the government from initiating questioning of defendants who had invoked their right to counsel. In cases of indicted defendants, the right to counsel attaches at critical stages of the proceedings upon the filing of the charges (*United States* v. *Wade*, 388 U.S. 218, 224; *Maine* v. *Moulton*, 474 U.S. ___, 88 L.Ed.2d 481, 492 (1985)) without the necessity of any such request. (*Carnley* v. *Cochran*, 369 U.S. 506, 513; *Brewer* v. *Williams*, 430 U.S. 387, 398, 404)

Therefore, the automatic invocation of the right to counsel by the return of the indictment is the legal equivalent of the demand for counsel in *Edwards*, *Jackson* and *Smith*. The procedure deemed proper there, barring the government from initiating interrogation, thus seems equally appropriate here. (See *Requirements*, 82 Col.L.Rev. 363, 383-5.)[1]

[1] Commentators suggest that police and prosecutors might alert the indicted accused to the nature of the sixth amendment right being waived. The value of specified warnings has been recognized (*Standards*, 60 B.U.L.Rev. 738 at 748; *Requirements*, 82 Col.L.Rev. 363, 364, 365 n. 18; *Fare* v. *Michael C.*, 442 U.S. 707, 718) and equivalent admonishments could be devised. (See for specifics *United States* v. *Callabrass*, 458 F.Supp. 964, 967 (D.C.N.Y. 1978) and *Mohabir*, 624 F.2d 1140 at 1152 n. 12 quoting *Callabrass*; *United States* v. *Brown*, 699 F.2d 585 at 588; *Standards*, 60 B.U.L.Rev. 738 at 762-3.) Or any waiver of the right to counsel is to be made in the presence of counsel. (See *Requirements*, 82 Col.L.Rev. 363 at 387 n. 164.) Or the accused is to be forbidden from waiving his critical sixth amendment right to counsel. (See *Requirements*, 82 Col.L.Rev. 363 at 387.)

The State did not follow this procedure and thereby establish here a valid waiver of the post-indictment right to counsel.

CONCLUSION

For the reasons stated herein, petitioner respectfully requests this Honorable Court reverse the decision of the Illinois Supreme Court refusing to order a retrial without the use of his inadmissible statements to authorities.

Respectfully submitted,

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RESPONDENT'S

BRIEF

(6)

No. 86-7059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TYRONE PATTERSON,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Assuming that petitioner's statements were "deliberately elicited" after indictment, did he make a valid waiver of his right to have counsel present inasmuch as waiver of the Sixth Amendment right to counsel at interrogation is adjudged by the same "full comprehension" standard as the Fifth Amendment right to counsel and *Miranda* warnings provide the information needed to fully comprehend that Sixth Amendment right?

2. Assuming petitioner did not effectuate a valid waiver of counsel, was his confession to the police in the absence of counsel after indictment "unelicited" and admissible at trial as a volunteered statement and was use at trial of his second identical confession later elicited by the prosecutor only harmless error?

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

The Investigation

On a Saturday night, August 20, 1983, there was a series of battles between rival gang members in Evanston, Illinois. (R. 461, 497, 500, 501, 505) The next morning, Sunday, August 21, police found a 19-year-old black youth named James "Pudge" Jackson lying face down in a puddle in a small park. (R. 421, 422, 812) His arms were stretched out above his head in the manner of a Vice Lord salute and his left leg was crossed over his right in the same symbolic positioning the Vice Lords use in "representing" or saluting to one another. (R. 741) Police experts understood the body positioning as a Vice Lord "calling card." (R. 741)

Detectives in the gang crime unit knew "Pudge" Jackson as a member of a gang called the Black Mobsters. (R. 466, 508, 740) They also knew that the Black Mobsters are rivals of two aligned gangs known as the Vice Lords and the Skoney Hoods. (R. 736) Late Sunday afternoon, police obtained a court warrant and arrested Juan McCune, a member of the Skony Hoods, on charges of misdemeanor battery and mob action in connection with a gang battle outside an Evanston club the night before. (R. 4, 5, 26-27, 553, 746) During an interview, McCune told detectives that he was also involved in the Jackson murder and gave them a statement, transcribed by a court-reporter, implicating Vice Lord gang members Tyrone Patterson, David Thomas, and Carl Harmon. (R. 520, 553-554, 556-557, 738-739, 859)

That evening about 7:00 p.m., on that same misdemeanor warrant used to arrest McCune, police arrested

17-year-old Patterson at his home. (J.A. 5; R. 6, 8, 35, 720) At the station, Patterson was taken to the detective bureau on the second floor where Officer Michael Gresham began processing him on the misdemeanor charges. (R. 8-11, 721) In the course of the processing, Officer Gresham also conducted a 20-40 minute interview. (R. 12, 723) He began by reading Patterson his *Miranda* warnings from a card and having Patterson acknowledge his understanding of each of th· rights as the detective read them. (R. 11, 764) Then he gave Patterson a copy of the arrest warrant and asked if he wished to make a statement about it. (R. 11, 30, 37, 722) Patterson made a statement about the battery and mob action charges stemming from the club fight. (R. 11)

The officer then asked Patterson if he knew anything about Pudge Jackson's murder, but Patterson said "no" and the officer dropped the subject. (R. 12, 33, 723, 764) By 10:00 p.m., the officer completed Patterson's processing on the misdemeanor charges and placed him in the lockup. (R. 13) About this time, police arrested Thomas on the misdemeanor charges and later that evening received his statement on the Jackson murder. (R. 751, 837-841)

The next day, Monday afternoon, having confessions from Thomas and McCune, prosecutors approved formal murder charges against Patterson, Thomas and McCune. (R. 17-18) A few hours later, police brought Patterson out of his cell to inform him of the charges and to let him visit with his mother and aunt. (R. 18-19, 35, 42-43, 46) They did not broach the subject of the crimes. (R. 18-19, 35, 42-43, 46) He spent a second night in the Evanston lockup. (R. 18, 19, 31, 44, 671, 782)

On Tuesday, August 23, the grand jury returned indictments against Patterson, Thomas and McCune for the

murder of Pudge Jackson. (J.A. 6; R. 19, 728) At 3:00 p.m. that afternoon, police escorted each of them out of the lock-up cells to the detective bureau so they could be processed and transported to the Cook County jail in Chicago. (J.A. 6; R. 729, 775, 782-783)

In the supervisor's office, Officer Gresham and another officer told Patterson that he had been indicted for the murder of Pudge Jackson. (J.A. 6, 12; R. 53-55, 775) Patterson immediately asked how many people had been indicted, and Officer Gresham replied three people: he, McCune, and Thomas. (J.A. 6-7, 12; R. 20-21, 729-730) Patterson asked why Carl Harmon was not also indicted since "he did everything" and explained that a neighbor girl would back him up because Harmon had admitted the murder to her. (J.A. 7-8, 13; R. 21, 231, 730)

The officer cut Patterson off and readvised him of his rights using a *Miranda* rights waiver form. (J.A. 7-8, 13; R. 21, 730-731) Patterson read over each of the rights with the officer as the officer read each right out loud. (J.A. 7, 14; R. 21-22, 731) Patterson placed his initial after each warning. (J.A. 7, 14; R. 21-22, 731) Patterson and both police officers signed the form at the bottom. (R. 22, 731)

At the completion of the waiver, the officer suggested Patterson "continue with what he was telling me before I stopped him." (J.A. 7-8, 14; R. 732) Then Patterson spoke to the officers about the murder for almost 45 minutes. (J.A. 14-15; R. 23, 734) He detailed how Pudge Jackson died and his own participation in that death. (J.A. 14; R. 732-734) The record contains no statement from the officers to Patterson during this entire statement except the single suggestion made by the officer at the completion of the *Miranda* warnings.

After the conversation, Officer Gresham contacted an Assistant State's Attorney, George Smith, of the felony-review unit, and told him that Patterson wanted to talk about the Jackson murder. (R. 23, 734, 793-794) The assistant arrived a little while later, 5:00 or 5:30 p.m., and visited Patterson alone. (J.A. 9, 16; R. 24, 72, 735, 795) He introduced himself to Patterson, showed him the *Miranda* rights waiver form he had just executed with the officers, and asked him if he had read that form and if he understood the rights enumerated on that form. (J.A. 10, 17; R. 73-74, 795-796) Patterson said he had, that he understood what his rights were, and that he had initialed the end of each paragraph and signed the bottom. (J.A. 10, 17; R. 74-75, 796) The Assistant State's Attorney read the document to Patterson and asked him again if he understood each of the rights. (J.A. 10, 17; R. 75, 796) Patterson said he did. (J.A. 10, 17; R. 75, 796) The assistant asked if he had any questions about his rights and Patterson said no. (J.A. 10; R. 75, 796) The assistant put his own signature on the bottom of the waiver form and made it clear to Patterson that he was assisting the police in the investigation of the murder. (J.A. 10, 18; R. 76, 796, 798) Patterson said he understood that the assistant State's Attorney was helping the police and was not his attorney. (J.A. 11, 18; R. 76, 798)

Patterson accepted the assistant's offer of a cigarette. (J.A. 18; R. 798) He told the assistant he was speaking of his own free will because he wanted to tell the truth. (J.A. 18, 19; R. 76, 799) He made it clear that no one had threatened or made any promises to induce him into making a statement, that he had been fed, was rested, and feeling well. (J.A. 18; R. 76-77, 799)

Patterson then repeated the story he had just told the detectives. (J.A. 19). Patterson's account was that on Saturday night a gang fight had broken out at a party about 2:30 a.m. (J.A. 19; R. 801) Patterson, Thomas, Harmon, and McCune fled but were followed by members of the Black Mobsters. (J.A. 19; R. 801) After several more confrontations, including one at the Evanston club, Patterson and his friends wound up at Thomas's house where they were standing out front when Pudge Jackson drove up. (J.A. 19-21; R. 732, 803, 806-808)

Jackson called out: "What do you want?" (J.A. 22; R. 809) Harmon replied: "What do you mean what do we want?", then ran to the car, yanked out the keys, and started punching Jackson. (J.A. 22; R. 732-733, 809) Patterson followed Harmon to explain that Jackson was no longer a member of the Black Mobsters. (J.A. 22; R. 809) But Harmon pulled Jackson out of the car and dragged him towards a grassy area. (J.A. 22; R. 809) As they all went at Jackson, Patterson's shoe came off and he struck Jackson with it. (J.A. 22; R. 733, 809) Harmon said: "He knows our names, we've got to kill him. I just got out of prison and I can't go back." (J.A. 22; R. 810)

They loaded Jackson back into his car and headed for a park at the end of the street. (J.A. 23; R. 733, 810-811) They drove into the middle of the park down to the canal where they dragged Jackson out. (J.A. 23; R. 733, 811) Harmon asked McCune for a knife and Patterson sent McCune home for one. (J.A. 23; R. 733, 811-812) Harmon hammered "dirt balls" at Jackson, then climbed on Jackson's back, hit him, and held his head down in a mud puddle. (J.A. 24; R. 733-734, 812) Jackson struggled and made a gurgling noise. (J.A. 24; R. 812) Finally, Harmon said: "He's dead, let's get out of here." (J.A. 24; R. 812)

At the end of Patterson's account, the assistant State's Attorney again asked him why he was making this state-

ment. (J.A. 24-25; R. 78, 814) Patterson's reply was that it was the truth and Pudge had been a friend of his. (J.A. 24-25; R. 78, 814) At the end of the processing, Patterson went to meet with his mother. (R. 814)

The Motion To Suppress And The Trial

Before trial Patterson filed a motion to suppress his statement to the detectives and the prosecutor. In his motion, he alleged violations of his Fourth, Fifth, Sixth, and Fourteenth Amendment rights. (J.A. 2-4) He alleged, *inter alia*, that he was not informed of his right to remain silent, not informed that anything he said could be held against him, not informed that he had a right to consult with an attorney, not informed that he had a right to have counsel present during interrogation, and not informed that if he was indigent the State would provide him an attorney. (J.A. 2-4)

At the hearing on Patterson's motion to suppress, Officer Gresham and Assistant State's Attorney Smith testified for the prosecution that they each gave Patterson his *Miranda* rights and that he waived those rights before he made his statement. (J.A. 7, 10) Patterson and his mother, who had accompanied her son to the police station, testified in support of the motion that Patterson never received any *Miranda* warnings or signed a waiver form until after he gave his statement to the officer and the prosecutor. (J.A. 2-4; R. 93, 115).

The court denied the motion to suppress and specifically commended the investigators for showing great regard for Patterson's rights by literally shutting him off when he started to speak. (R. 168-169) The court commented that this is what *Miranda* is all about: a down-to-earth awareness and acknowledgment of a defendant's constitutional rights in the police station. (R. 169)

McCune eventually testified for the State at the trial of Patterson and Thomas. (R. 488) Patterson did not testify or present any evidence, but his confession was admitted through testimony of Officer Gresham and Assistant State's Attorney Smith. (J.A. 12, 16; R. 715, 792) Both Patterson and Thomas were found guilty by a jury. (R. 1158-1160, R. C1239, C1316) Police were unable to find Harmon until after trial. (R. 765)

Review On Appeal

On state review, Patterson raised the claim that his statement should have been suppressed as taken in violation of his Sixth Amendment right to counsel because the Sixth Amendment requires a higher standard for showing a waiver of the right to counsel than that required for *Miranda* waivers.

The appellate and supreme courts declined to treat the issue as waived. Both courts agreed in unanimous opinions that Patterson's knowledge of his *Miranda* rights under the Fifth Amendment, together with the knowledge of the fact that he had been indicted for Jackson's murder, afforded him sufficient information to knowingly and intelligently waive his Sixth Amendment right to counsel. (J.A. 26, 36)

SUMMARY OF ARGUMENT

I. At postindictment custodial interrogation, Patterson had a Sixth Amendment right to counsel which provides an accused the professional skill necessary to meet his adversary when police elicit incriminating evidence after

the initiation of formal proceedings. *Massiah v. United States*, 377 U.S. 201, 206 (1964). Assuming the statements were elicited, they were admissible at trial because Patterson waived counsel under *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There is no merit to Patterson's call for a "higher" waiver standard since *Zerbst* applies regardless of the source of the right. *Zerbst*'s focus on a comprehension of the right itself accommodates any difference in comprehension concerning a Sixth and Fifth Amendment waiver. Any difference would be reflected only in the circumstances necessary to meet the standard.

Nor is there merit to the claim that a comprehension of the *Massiah* right must be "higher" than the already full comprehension required under *Zerbst* for both Fifth and Sixth Amendment waivers. A single standard for comprehension is desirable. It avoids selecting the Sixth Amendment right as more important than the Fifth and also avoids demeaning the *Miranda* right as being only "judicially created." Furthermore, this Court has analyzed these theoretically distinct rights similarly when they overlap at the jailhouse in other contexts and the waiver can be analyzed similarly, as well.

The theoretical distinction between these rights is of no moment to the average person at the stationhouse. Since he can comprehend a right to counsel without knowing the theory behind counsel's role, such theory plays no meaningful role in the waiver. The *Miranda* litany requires neither a statement of the policy behind the warnings nor of every possible consequence of a waiver, yet still provides a person the chance to exercise informed judgment in deciding whether to speak to authorities without counsel.

Strict Sixth Amendment analysis demonstrates that comprehension of the *Massiah* right is secured by the very same warnings provided by *Miranda*. These inform an accused that he has a right to the presence of counsel when speaking to police and that whatever is said can be used against him in court. This assures comprehension of the consequence of abandoning his *Massiah* right since *Massiah*'s remedy is suppression of elicited statements from use at trial. *Miranda* warnings offset the government's advantage at interrogation because the accused is now free to keep quiet and consult with an attorney if he chooses.

The majority of the Courts of Appeals agree that a *Miranda* waiver is also a *Massiah* waiver. This Court should reject Second Circuit decisions which require that a waiver be preceded by additional warnings from a judicial officer. *Miranda* represents a sound balance between the rival interests of law enforcement to obtain admissions of guilt and the Sixth Amendment right of the accused to attain the skills he needs to face his adversary. Where sound choice can be exercised after police provide *Miranda* warnings, there is no reason to require more in the Sixth Amendment context. Additional warnings from a judicial officer which serve only to discourage an accused from choosing against the exercise of his right underestimates his competence, denies respect for his capacity to freely choose whether to take advantage of a constitutional protection, and denies him the right to dispense with a lawyer's help for the period of time between indictment and arraignment.

This Court should also reject the idea that the right can be waived only after an accused has received a *Faretta*-type explanation. This alternative fails to recognize that the intricate services being waived in *Faretta* are irrevelant in the

Massiah context because they include pretrial proceedings, preparation of a defense, and the conduct of the trial itself. These services are of no help to the accused during interrogation at the stationhouse because he is concerned with a counsel's present role at the critical stage at hand, not his future role.

This Court can easily find under the *Zerbst* standard that Patterson knew his *Massiah* right and relinquished it. Not only did he make a valid *Miranda* waiver, but there is additional evidence of waiver as well, including that: Patterson initiated the contact with the police, had never requested counsel, knew that he was under indictment, knew he was confronting government agents, and knew a request for counsel would be honored because police had already shown respect for his rights.

II. The confession Patterson gave to the officers was admissible as an unelicited, volunteered statement. This record does not demonstrate that the police took action beyond merely listening designed to elicit incriminating remarks. The statement was volunteered during processing as he was being transferred to another facility, a noncritical stage involving neutral, routine government contact. There was no causal connection between the processing and the confession, no police overreaching, no direct questioning, no way to know he would make incriminating statements. The police merely listened to a few statements, interrupted him to provide him *Miranda* warnings, then continued to listen to his account. The trial judge commended the police for their awareness of Patterson's rights by shutting him off when he started to speak. Thus, the officers observed the essence of the *Massiah* right which prevents the government from exploiting its advantage of power to elicit confessions that would not be given by an accused who possessed equal professional

legal skill. Patterson's confession to police was admissible as voluteered and voluntary.

A second identical confession used at trial was elicited by a prosecutor but only after he secured what he believed was a waiver of the presence of counsel. In the event that there was no valid waiver, use of this evidence was only harmless error as cumulative of the admissible, identical confession.

ARGUMENT

In the first argument, Illinois assumes that the authorities deliberately elicited Patterson's statements but maintains that there was no violation of the Sixth Amendment right to counsel because Patterson waived that right. In the subsequent argument, Illinois maintains that the statements to police officers were volunteered, not elicited, and therefore were admissible without violating the Sixth Amendment.

I.

ASSUMING THAT PATTERSON'S STATEMENTS WERE "DELIBERATELY ELICITED," THEY WERE ADMISSIBLE AT TRIAL BECAUSE PATTERSON WAIVED HIS RIGHT TO HAVE COUNSEL PRESENT WHEN THE GOVERNMENT ELICITED THEM AFTER INDICTMENT.

Patterson Had A Right To Counsel At Postindictment Custodial Interrogation.

This Court established that the right to counsel exists at postindictment custodial interrogation in its decisions in *Brewer v. Williams*, 430 U.S. 387 (1977); *Maine v. Moulton*,

___ U.S. ___, 106 S.Ct. 477 (1985) and *Michigan v. Jackson*, ___ U.S. ___, 106 S.Ct. 1407 (1986). The right has two sources. One source, first recognized in *Miranda v. Arizona*, is the Fifth Amendment protection against compelled self-incrimination which provides the right at custodial interrogations to dispel the coercive nature of police encounters at the stationhouse. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Jackson*, 106 S.Ct. 1407.

The other source of the right, which is the subject of this appeal, is the Sixth Amendment guarantee of the assistance of counsel in the course of criminal proceedings. This Court first applied the Sixth Amendment to postindictment communications between the accused and agents of the government in *Massiah v. United States*, 377 U.S. 201, 206 (1964). Since *Massiah*, this Court has held the right applicable whenever police seek to elicit incriminating evidence after formal judicial proceedings have been initiated, such as by indictment. *Brewer*, 430 U.S. at 398, 437; *Moulton*, 106 S.Ct. at 485, 489; *Jackson*, 106 S.Ct. at 1407-1408; *United States v. Henry*, 447 U.S. 264, 270-275 (1980). The *Massiah* right to counsel guarantees that the nature of the criminal justice system remain adversarial by providing a formally charged accused a "medium" between him and the State, *Moulton*, 106 S.Ct. at 487, to meet the prosecutorial forces of an organized society, *Moulton*, 106 S.Ct. at 484, and confront the intricacies of the law and the advocacy of the public prosecutor. *United States v. Gouveia*, 467 U.S. 180, 188-189 (1984).

The *Massiah* right arises only when the statements are deliberately elicited from the accused by the government. *Massiah*, 377 U.S. at 206; *Henry*, 447 U.S. at 270-275; *Kuhlmann v. Wilson*, ___ U.S. ___, 106 S.Ct. 2616,

2630 (1986). The existence of the right does not depend upon a request by defendant, *Jackson*, 106 S.Ct. at 1409, n. 6; *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); rather, it is presumed that an accused requests a lawyer's service at every critical stage of the prosecution. *Jackson*, 106 S.Ct. at 1409; *Carnley*, 369 U.S. at 513; *Brewer*, 430 U.S. at 404-405. Elicited statements can be used at trial only if the accused first waives his *Massiah* right. *Jackson*, 106 S.Ct. at 1409; *Brewer*, 430 U.S. at 404-405.

Any waiver is invalid where the police initiate interrogation without the presence of counsel after the accused has explicitly asserted his right, *Jackson*, 106 S.Ct. at 1411. But this case does not fall under the *Jackson* rule for two reasons: Patterson did not explicitly assert his right and the police did not initiate the interrogation. Patterson's contention that the prosecutor himself invokes the defendant's right to counsel by returning an indictment against him misses the point of *Jackson* which clearly required an assertion from the defendant, for instance his acceptance of counsel at arraignment.

Thus, the question is whether Patterson waived his *Massiah* right to have counsel present when, at his initiation after indictment, he confessed to his participation in the murder. Patterson claims he did not make a valid waiver because he lacked full comprehension of the *Massiah* right. He agrees that he fully comprehended his *Miranda* right to have counsel present during custodial interrogation and that he voluntarily relinquished his right. But he claims that the Sixth Amendment right is a "higher" right than the Fifth Amendment right and must be held to a higher waiver standard. Although he understood his *Miranda* right, he did not understand his higher *Massiah* right. Investigators failed to provide him information about what the *Massiah* right to counsel entails and in-

formed him only of his less important Fifth Amendment rights to counsel and to silence by way of the *Miranda* warnings. Therefore, the statements were used at trial in violation of his *Massiah* right.

Waiver Of The Right To Counsel At Post-Indictment Custodial Interrogation, Whether Derived From The Fifth Or The Sixth Amendment, Is Determined By The *Johnson v. Zerbst* Standard.

Illinois disagrees with Patterson's claim that a Sixth Amendment waiver of counsel at interrogation requires a "higher" standard of waiver or comprehension than a Fifth Amendment waiver. There is no dispute that the standard for a waiver of a fundmental right was created in *Johnson v. Zerbst*, under which the government must show "an intentional relinquishment or abandonment of a known right or privilege" from the totality of the circumstances surrounding the case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *North Carolina v. Butler*, 441 U.S. 369, 375 (1979).

This Court has applied the *Zerbst* waiver standard for waivers of counsel at post-indictment custodial interrogation regardless of whether the source of the right was the Sixth Amendment, *Brewer*, 430 U.S. at 404; *Jackson*, 106 S.Ct. at 1409, or the Fifth Amendment. *Burbine*, 106 S.Ct. at 1141; *Edwards*, 451 U.S. at 482; *Oregon v. Bradshaw*, 462 U.S. 1039, 1046 (1983); *see also Bradshaw*, 462 U.S. at 1051 (Powell, J., concurring) ("we are unanimous in agreeing . . . that the [Miranda] right to counsel is a prime example of those rights requiring the special protection of the [*Zerbst*] knowing and intelligent waiver standard").

The standard consists of two distinct inquiries. One is whether the accused relinquished his right freely and by deliberate choice and not because of intimidation, coercion, or deception. *Brewer*, 430 U.S. at 404; *Burbine*, 106 S.Ct. at 1141. The other is whether the accused fully comprehended the nature of his right and the consequences of abandoning it. *Brewer*, 430 U.S. at 404; *Burbine*, 106 S.Ct. at 1141.

This standard accommodates both the Fifth Amendment and the Sixth Amendment because it focuses on a defendant's comprehension whatever the source of his right. Thus, it can work even if, as Patterson claims, there is some difference in comprehension concerning a *Massiah* and *Miranda* counsel waiver, because the difference would be reflected only in the circumstances necessary to meet the standard. *See United States v. Mohabir*, 624 F.2d 1140, 1153 (2nd Cir. 1980) (in pretext of setting a "higher" waiver standard, court required that additional circumstances be contained in the record, namely an explanation of the *Massiah* right by a judicial officer); *see also Fields v. Wyrick*, 464 U.S. 1020 (1983) (Marshall, J., dissenting).

If the circumstances are different it is not because one right is greater than the other, but because comprehension of the right comes from different knowledge. The *Zerbst* standard already takes into account the significance of each entitlement since it examines all the circumstances to determine if the defendant comprehended and relinquished the particular right involved. Whatever the source of the right, *Zerbst* requires a "high" standard of proof of waiver. *Miranda*, 384 U.S. at 475. Inasmuch as a defendant must fully comprehend his *Miranda* right to counsel to waive it, a standard "higher" than full comprehension is not warranted for a *Massiah* waiver.

Moreover, use of the same standard of comprehension under *Zerbst* for both *Massiah* and *Miranda* waivers avoids an unnecessary and hazardous discourse on the comparative worth of these separate constitutional guarantees. Given that the *Miranda* right to counsel is "indispensible" to the individual at the jailhouse, *Miranda*, 384 U.S. at 469, it is difficult to fathom the *Massiah* right as something in the nature of "super-indispensible." The *Zerbst* standard circumvents this difficulty by examining waivers of counsel, including the defendant's full comprehension of the right, without selecting the Sixth Amendment right as more important than the Fifth Amendment right.

Use of the same standard of proof also forestalls Patterson's effort to demean the *Miranda* right to counsel as being only "judicially created" in comparison to the constitutionally based *Massiah* right. The Fifth Amendment right may be judicially created, but it has always been regarded as fundamental and relinquished only in the same manner as any other fundamental right. *Burbine*, 106 S.Ct. at 1141; *Edwards*, 451 U.S. at 482; *Bradshaw*, 462 U.S. at 1046; *but see North Carolina v. Butler*, 441 U.S. 369, 377 (1979) (Blackmun, J., concurring) (suggesting *Zerbst* waiver standard may be too high for Fifth Amendment). Furthermore, the *Massiah* right itself is an extension of the Sixth Amendment entitlement to counsel to this earlier stage deemed "critical" because it could reduce the trial to a mere formality. *Moulton*, 106 S.Ct. at 485. As a "critical stage" right, the *Massiah* right is just as "judicially created" as the *Miranda* right and the *Massiah* decision, like the *Miranda* decision, could technically be overturned by five members of this Court. Patterson's attempt at this comparison is unavailing and is happily avoided by consistent application of the *Zerbst* standard.

Another reason the *Massiah* right needs no "higher" standard of comprehension is that, while the *Miranda* and *Massiah* rights are theoretically distinct, this Court has analyzed them similarly when the circumstances have called for it. This has most often occurred when these separate protections have overlapped at the jailhouse. For instance, at the jailhouse the *Miranda* requirement of interrogation overlaps with the *Massiah* requirement of elicitation. In *Brewer*, this Court said that *Massiah* provided the right to legal representation whenever the government "interrogates" the accused. *Brewer*, 430 U.S. at 401. In *Kuhlmann*, this Court said that *Massiah* was concerned with interrogation or investigative techniques that are the equivalent of interrogation. *Kuhlmann*, 106 S.Ct. at 2629-2630. In *Rhode Island v. Innis*, this Court defined interrogation as words or actions by the police that are "reasonably likely to elicit" an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980).

These policies do not always overlap. When, as in *United States v. Henry*, the government has staged a surreptitious encounter with an informant outside the stationhouse so that *Massiah*, but not *Miranda*, is implicated, obviously Sixth Amendment analysis does not infuse Fifth Amendment principles. *Henry*, 447 U.S. at 273. But *Henry* acknowledged that there is an overlapping of Fifth and Sixth Amendment policies when the accused speaks to a known government agent at the jailhouse because the accused is aware that his statement can be used against him, the adversary positions at that encounter are well established, and the parties are then "arms' length" adversaries. *Henry*, 447 U.S. at 273. Indeed, Justice Blackmun, joined by Justice White, has candidly suggested that there is no discernible difference in the formulations of interrogation and elicitation when an accused faces a

known government official at the stationhouse. *Henry*, 447 U.S. at 287 (Blackmun, J., dissenting).

"Custody" is another concept that overlaps in Fifth and Sixth Amendment analysis. Although generally thought of as a *Miranda* concept, it is shared in *Massiah* analysis insofar as custody may bring into play subtle influences that will make an accused particularly susceptible to the ploys of government agents who elicit information. *Henry*, 447 U.S. at 273.

Furthermore, the *Massiah* and *Miranda* protections share the concept that police-initiated interrogation is prohibited once counsel is requested. In *Michigan v. Jackson*, this Court applied the Fifth Amendment *Edwards* rule within the Sixth Amendment context on the premise that any protection available to a suspect at interrogation must certainly be available to an indicted accused, as well. *Jackson*, 106 S.Ct. at 1409.

Therefore, at the stationhouse, comprehension of the *Massiah* right can be determined in the same manner as the *Miranda* right. When the policies they serve have overlapped, they have been analyzed in the same way despite the distinct policies underlying these separate rights. However distinct the policies, they are still waived only on *full* comprehension. In the context of jailhouse interrogations, consistent analysis under the single workable *Zerbst* standard suits both these separate protections. *Brewer*, 430 U.S. at 404 (Sixth Amendment); *Burbine*, 106 S.Ct. at 1141 (Fifth Amendment); *Edwards*, 451 U.S at 482 (Fifth Amendment).

Miranda Warnings Provide A Formally Charged Accused The Information He Needs To Effectuate A Knowing *Massiah* Waiver.

The gist of Patterson's claim is that the *Miranda* warnings do not convey to the accused all that he must comprehend to effectuate a knowing *Massiah* waiver of counsel because *Miranda* derives from the Fifth Amendent which serves a theoretically distinct policy from the Sixth Amendment. The State of Illinois maintains that, since *Miranda* warnings convey to the indicted accused in simple language his right to counsel and the consequences of foregoing that right at the stationhouse, they serve the Sixth Amendment, as well as the Fifth, regardless of the different theories underscoring these protections.

The theory underlying the Fifth Amendment right to counsel is to protect the privilege against self-incrimination from the compulsions inherent in the custodial interrogation process. *Miranda*, 384 U.S. at 467. The theory underlying the Sixth Amendment right to counsel is distinct in that it provides a formally charged accused with the professional legal skill he needs when the authorities elicit incriminating information from him. *Moulton*, 106 S.Ct. at 484. But these distinctions as to counsel's role are not relevant to a person facing his adversary at the stationhouse. As this Court noted in *Michigan v. Jackson*, this theoretical constitutional distinction would be lost on the average person at the stationhouse:

> [A]lthough judges and lawyers may understand and appreciate the subtle distinctions between the Fifth and Sixth Amendment rights to counsel, the average person does not. When an accused requests an attorney, either before a police officer or a magistrate, he does not know which constitutional right he is invoking;

> he therefore should not be expected to articulate exactly why or for what purposes he is seeking counsel. * * * The simple fact that defendant has requested an attorney indicates that he does not believe he is sufficiently capable of dealing with his adversaries singlehandedly.

Jackson, 106 S.Ct. at 1409, n.7.

In the same vein, in *Moran v. Burbine*, Justice Stevens, joined in dissent by Justices Brennan and Marshall, wrote that an individual has the right to counsel during questioning and "[w]hether the source of that right is the Sixth Amendment, the Fifth Amendment, or a combination of the two is of no special importance." *Burbine*, 106 S.Ct. at 1163 (Stevens, J., dissenting). Likewise, in *Brewer v. Williams*, Justice White, joined in dissent by Justices Rehnquist and Blackmun, wrote that,

> It does not matter whether the right not to make statements in the absence of counsel stems from *Massiah* [citation omitted] or *Miranda* [citation omitted]. In either case the question is one of waiver.
>
> * * *
>
> [*Massiah* provides] exactly the same right as that involved in *Miranda*. If an intentional relinquishment of the right to counsel under *Miranda* is established by proof that the accused was informed of his right and then voluntarily answered questions in counsel's absence, then similar proof established an intentional relinquishment of the *Massiah* right to counsel.

Brewer, 430 U.S. at 430, n.1 and 435, n.5 (White, J., dissenting). To the accused, unschooled in constitutional jurisprudence, there is simply a right to counsel.

Since the accused can comprehend a right to counsel without knowing the theory of counsel's role underlying the source of the right, such theory plays no meaningful

role in the waiver. All he needs to know to waive his right to counsel is that he has a right to counsel and that he can suffer consequences if he relinquishes it. It is then his responsibility to decide whether to assert it or waive it.

This Court has already created the *Miranda* warnings to serve this function for the Fifth Amendment. *Miranda* requires that the suspect be told that he has a right to remain silent and a right to the presence of an attorney, retained or appointed. *Miranda*, 384 U.S. at 468, 471, 479. He must also be told that, if he abandons his rights, whatever he says to the authorities can and will be used against him in court. *Miranda*, 384 U.S. at 469, 479. In this way, a suspect can comprehend the rights he has at the stationhouse and the consequences of abandoning them. *Miranda* gives him the chance to exercise his own free, informed judgment in deciding whether or not to make a statement to authorities. *Oregon v. Elstad*, 105 S.Ct. 1285, 1293 (1985). The litany requires neither a statement of the policy behind the warnings nor a statement of every possible consequence of a waiver. *Colorado v. Spring*, 107 S.Ct. 851, 857 (1987); *Burbine*, 106 S.Ct. at 1144; *Elstad*, 105 S.Ct. at 1297-1298. The suspect's comprehension is best assured by the fact that the litany is simple. *Miranda*'s beauty is its easy application. *Burbine*, 106 S.Ct. at 1143.

This Court has not created warnings to serve this function for the Sixth Amendment. But analysis of Sixth Amendment objectives demonstrates that the warnings would be the same. The accused's comprehension of the *Massiah* right would be secured by any warning from known government officials that he has a right to the presence of counsel when speaking to them. *Brewer*, 430 U.S. at 404 (defendant informed of and appeared to understand his

Sixth Amendment right to counsel; *see Elstad*, 105 S.Ct. at 1297 (the standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking). Comprehension of the consequences of abandoning the *Massiah* right would derive from any warning that whatever he says to them could be used against him in court. It is quite clear that this is the consequence of a *Massiah* violation since the *Massiah* remedy is suppression of any elicited statement from use at trial. *Massiah*, 377 U.S. at 206; *Henry*, 447 U.S. at 274; *Kuhlmann*, 106 S.Ct. at 2628-2629.

Thus, strict Sixth Amendment analysis leads to the conclusion that comprehension of the *Massiah* right arises from the very same information provided by *Miranda*. *Miranda* warnings serve the Sixth Amendment, as well as the Fifth. The very same recitation that provides the suspect the opportunity to dispel interrogational compulsion, also provides the accused the opportunity to acquire the professional legal skills he needs to counter the adversarial imbalance at stationhouse interrogation. The *Miranda* warnings offset the government's advantage because the accused is now free to keep quiet and consult with an attorney if he chooses. He knows that the whole range of counsel's skill is available. If he talks without counsel, he is accountable for his action and must bear the consequences of foregoing a "medium" between him and the State. *See Henry*, 447 U.S. at 294 (Rehnquist, J., dissenting).

Therefore, Illinois asks this Court to hold that where the accused is face-to-face with his known adversary—whether a police officer or a prosecutor—a *Miranda* waiver will also be a *Massiah* waiver. In this conclusion, Illinois enjoys the support of the majority of the Courts of Appeals which have found that a satisfactory waiver of Fifth Amendment counsel was also a waiver of Sixth Amendment counsel. *United States v. Monti*, 557 F.2d 899, 904 (1st Cir. 1977); *United States v. Cobbs*, 481 F.2d 196, 200 (3rd Cir. 1973); *Jordan v. Watkins*, 681 F.2d 1067, 1075 (5th Cir. 1982); *United States v. Woods*, 613 F.2d 629, 634 (6th Cir. 1980); *Love v. Young*, 781 F.2d 1307, 1317-1318 (7th Cir. 1986); *Fields v. Wyrick*, 706 F.2d 879, 881 (8th Cir. 1983); *United States v. Binder*, 769 F.2d 595, 599 (9th Cir. 1985); *Tinsley v. Purvis*, 731 F.2d 791, 796 (11th Cir. 1984). By the very fact that both the *Miranda* and *Massiah* waiver scrutinies examine *all* the facts in a particular record, the lower courts have been able to conclude that a defendant who effectuates a valid *Miranda* waiver necessarily effectuates a valid *Massiah* waiver. *Love*, 781 F.2d at 1317, n.8 (most circuits have adopted bright-line test that "a waiver of *Miranda* rights under the Fifth Amendment alone is sufficient to demonstrate a valid waiver of the separate Sixth Amendment right to counsel").

Patterson's claim that the lower courts actually support his position is misleading since he completely ignores all the above-cited authority and relies solely on Second Circuit decisions like *United States v. Mohabir*, 624 F.2d 1140 (2nd Cir. 1980). The Second Circuit has held that *Miranda* warnings do not provide an explanation of the *Massiah* right and the Constitution requires a greater showing by the government than the mere giving of these warnings. *Mohabir*, 624 F.2d at 1149-1150. It is the only Circuit to have exercised its supervisory powers to require in federal cases that a valid waiver of the *Massiah* right must be preceded by a federal judicial officer's explanation of the context and significance of this right: being told he is indicted, shown the indictment, told the significance of the indictment, told he has a right to counsel, and told about the seriousness of the situation in the event he elects to

answer questions posed by law enforcement officials outside the presence of an attorney. *Mohabir*, 624 F.2d at 1153.

Illinois has already shown that the Second Circuit's constitutional analysis of the connection of *Miranda* warnings to an accused's comprehension of his *Massiah* right and its requirement of additional warnings is flawed and rejected by the other Circuits. Obviously then, the purpose of additional warnings could only be to discourage an accused from choosing against the exercise of his right. But this is a purpose beyond that of the Constitution which aims to place counsel within reach of the accused so he can make himself the equal of his adversary, offset the government's unfair advantage, and dispel its coercive methods by dealing only through the "medium" of counsel. *Elstad*, 105 S.Ct. at 1291; *Moulton*, 106 S.Ct. at 484; *Gouveia*, 467 U.S. at 188-189.

Once the accused understands that he has this opportunity, the Constitution will honor his decision to forego the opportunity and express himself with candor. *Burbine*, 106 S.Ct. at 1146-1147; *Faretta v. California*, 422 U.S. 806, 833-834 (1975); *Michigan v. Mosley*, 423 U.S. 96, 109 (1975) (White, J., concurring); *Edwards*, 451 U.S. at 490-491 (Powell, J., dissenting). This Court has always protected a person's decision to exercise a constitutional right as his own decision, however unwise it may be. *Faretta*, 422 U.S. at 833-834; *see Schneckloth v. Bustamonte*, 412 U.S. 218, 283 (1973) (Marshall, J., dissenting) (consent searches are permitted because "we permit our citizens to choose whether or not they wish to exercise their constitutional rights"). Free, informed choice is of "inestimable worth." *Faretta*, 422 U.S. at 834. *Miranda* itself was premised on a respect for the individual's capacity to freely choose whether or not to take advantage of a constitutional protection. *Elstad*, 105 S.Ct. at 1296 (referring to "rational and intelligent" choices "to invoke" right); *Mosley*, 423 U.S. 96, 104-106 (1975) (requiring agents to "scrupulously honor" individual's opportunity for intelligent assessment of the options and right to make an autonomous decision). *Miranda*'s concern for a suspect's vulnerability was complemented by the willingness to afford him an opportunity for free, informed choices and a reluctance to underestimate his capacity and competence. *See Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 1010, n.139 (1986).

The Second Circuit's approach actually overprotects the accused since it operates to "imprison a man in his privileges and call it the Constitution" for the period of time between indictment and arraignment. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942). Seemingly protecting his right to counsel, the Second Circuit rule actually denies him the "correlative right to dispense with a lawyer's help" at a point where he, like Patterson, may for personal reasons choose to exercise it. *Faretta*, 422 U.S. at 814, 821, 832. So that the right does not turn into a liability, a *Massiah* waiver should be possible at any encounter with authorities.

Thus, any truthful statement an accused freely makes against himself, uninduced by government superiority or coercion, is welcomed under our neutral constitutional charter as desirable and a proper element of law enforcement. *Elstad*, 105 S.Ct. at 1291; *United States v. Washington*, 431 U.S. 181, 187 (1977). *Miranda* represents the sound balance between the rival interests of law enforcement to obtain admissions of guilt and of the suspect to dissipate coercion in the interrogation room, *Burbine*, 106 S.Ct. at 1141. It equally balances, within the *Massiah* context, the goals of law enforcement against the right of

the accused to attain the professional skills he needs to face his adversary. *See Brewer*, 430 U.S. at 435, n.5 (White, J., dissenting) ("there is absolutely no reason to require an additional question to the already cumbersome *Miranda* litany" where the Sixth Amendment right is exactly the same as the Fifth Amendment right).

Where sound choice can be exercised after a police officer, not a judicial officer, provides *Miranda* warnings, there is no legitimate reason to require more in the Sixth Amendment context. The Second Circuit's additional requirement is a paternalistic reaction that unjustifiably constrains legitimate law enforcement activity. This Court should reject the conclusion that a judicial officer must fully explain indictment procedure before the *Massiah* right may be waived.

This Court should also reject *United States v. Satterfield*, 417 F.Supp. 293 (S.D.N.Y. 1976), upon which Patterson relies. *Satterfield* holds that the *Massiah* right can be waived only after an accused has received a full *Faretta*-type explanation from a judicial officer. *Satterfield*, 417 F.Supp. at 296. Under *Satterfield*, after indictment, the advice of counsel can be waived only after such warnings and explanations as would justify a court in permitting a defendant to proceed *pro se* at trial. *Satterfield*, 417 F.Supp. at 296. This holding, however, fails to distinguish the *Faretta* concerns from the very different *Massiah* concerns.

Faretta addressed counsel's help at the courthouse whereas *Massiah* addressed counsel's help outside the courthouse. The intricate substantive and procedural services being waived in *Faretta* are irrelevant in the *Massiah* context because they include such things as: testing the indictment on a pretrial motion, challenging the admissibility of evidence at a preliminary hearing, preparing the defense,

or confronting witnesses at the trial itself. *Faretta*, 422 U.S. 818; *Moulton*, 106 S.Ct. at 484; *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). Such important professional services are of no help to the indicted accused during interrogation at the stationhouse.

Satterfield also went too far because it failed to understand that an accused at interrogation is waiving only a present desire for counsel, not a future one. For instance, no one associated with Patterson contemplated that, after he waived counsel's presence at the stationhouse, he would be going through the rest of the criminal process, including trial, alone. Indeed, Patterson utilized the services of counsel at all later critical stages. The *Massiah* waiver was not in fact a *Faretta* waiver and there is no reason to require that a *Massiah* waiver be, in theory, a *Faretta* waiver.

This conclusion is supported by *United States v. Wade*, 388 U.S. 218, 235-236, 238 (1967), where this Court extended the Sixth Amendment right to counsel to pretrial corporeal identification on the basis that counsel has a role to play at this critical stage, namely to preserve his client's interests by objecting to suggestive features of procedure before they influence a witness's identification. He could do this by requesting a postponement until a less suggestive setting is arranged, asking that the victim be excluded at prejudicial junctures, or cross-examining the victim to test the identification before it hardens. *Moore v. Illinois*, 434 U.S. 220, 231 n.5 (1977). These cases demonstrate that the relevant focus remains on counsel's role at the critical stage at hand. A waiver of *Wade* counsel would obviously depend on the defendant's comprehension of what counsel can do for him at the line-up and these services do not even marginally encroach the kind of service contemplated in *Faretta*.

Therefore, this Court should reject the expansive approaches taken in both *Mohabir* and *Satterfield*. In the same way that this Court has rejected interpretations of *Miranda* that sought to "transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," *Mosley*, 423 U.S. at 102, it should also reject any similar approaches which attempt to lead the *Massiah* right down that same irrational path.

The Record Shows That Under The Totality Of The Circumstances Patterson Waived His Right To The Presence Of Counsel When He Confessed To Authorities.

This Court can easily find under the *Zerbst* standard that, on the totality of the circumstances in this record, including the experience, background, and conduct of the accused, Patterson knew his *Massiah* right and intentionally relinquished it.

Illinois has just shown that *Miranda* provided the comprehension necessary to waive the *Massiah* right. Patterson demonstrated his comprehension of his *Miranda* right to have an attorney present and his relinquishment of that right by signing a waiver form. This record contains no evidence of deception or threats or promises that might have induced him to speak involuntarily. Patterson was in normal, alert mental and physical condition when he waived his *Miranda* right. Further evidence that his action was thoughtful and purposeful is his explanation that he spoke because he wanted to tell the truth and the victim had been his friend. This evidence of a *Miranda* waiver is a demonstration of a *Massiah* waiver.

Patterson has completely ignored the other evidence which also reveals waiver. For instance, another sign of *Massiah* waiver is the fact that Patterson initiated the contact. The initiation question, which is crucial after an

accused has requested counsel, *Jackson*, 106 S.Ct. at 1411, is, before the accused has requested counsel, a sign of waiver of the "right to be free of contact with the authorities in the absence of an attorney." *Wyrick v. Fields*, 459 U.S. 42, 47 (1982); *Edwards*, 451 U.S. at 482; *Bradshaw*, 462 U.S. at 1047. This conduct by the accused is germane because his initiation is a good indication that the government was not seeking to exploit any adversarial imbalance that arises in the absence of counsel. Four members of this Court have defined "initiation" as an individual's "willingness and a desire for generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045-1046 (plurality opinion). Four others have more narrowly defined it as "communication or dialogue about the subject matter of the criminal investigation." *Bradshaw*, 462 U.S. at 1053 (Marshall, J., dissenting). Patterson's confessions, initiated with a question as to who had been indicted up till now, pass either definition.

Further indication of waiver is that Patterson never requested counsel. He did not request counsel during interrogation with police Sunday night, nor Monday afternoon when police informed him that formal murder charges had been approved and that he could visit with his mother, nor Tuesday afternoon when the police called him out of his jail cell and told him that the indictment had come down and he would be transferred to the Chicago facility. Moreover, his statements were given before he made any judicial appearance where he might have accepted appointment of counsel. *See Jackson*, 106 S.Ct. at 1408. Had he asserted his right at any of those times, this could have been concrete evidence that Patterson felt a present and real need for counsel to eliminate pressure stemming from government superiority or coercion. The absence of an assertion contributes to the conclusion that Patterson was

not feeling pressure from the government to make a statement.

Other evidence is that Patterson knew that he was under indictment before he made any statement. This knowledge underscores Patterson's opportunity to apprise the grave situation he was facing and the urgency of his need for a lawyer's assistance before making a decision to speak through counsel. His choice to speak directly to the police was made on a real assessment of his plight.

Another indication of comprehension and relinquishment is that Patterson knew he was confronting government agents. The officers to whom he confessed had been the same men who arrested him, booked him, and detained him, so he was well aware they were his adversary. The prosecutor to whom he confessed had first received Patterson's assurance that Patterson knew he was an attorney for the State, which made him an opponent, not an ally. This evidence eliminates any possibility that Patterson made statements on the miscalculation that his listeners had his interest in mind.

Additional evidence of a knowing waiver is that he knew any request for counsel would be honored. In the two days after he told the officers Sunday night that he would not talk about the murder, the police never asked him about the murder again. This experience demonstrated to Patterson that the police respected his requests and, should he ever request to deal with them only through counsel, the police would respect that request, as well. This evidence eliminates any danger that Patterson confessed on the misconception that it would be useless to assert his right to deal with them through counsel.

Finally, no inference of a misunderstanding of the right arose out of the mere fact that Patterson made a statement without first securing the presence of counsel. In *Oregon v. Elstad*, this Court held that, in the absence of coercive tactics by the authorities, it would not presume that compulsion was the reason a suspect chose to speak. *Elstad*, 105 S.Ct. at 1296. A suspect might be motivated to speak to authorities alone for any number of reasons not related to compulsion: a prearrest visit with a preacher or the exchange of words with one's father, *Elstad*, 105 S.Ct. at 1296, or the simple human urge to confess wrongdoing. *Brewer*, 430 U.S. at 420 (Burger, J., dissenting). The moral or psychological pressures to confess which emanate from sources other than official coercion are not the concern of the Fifth Amendment. *Elstad*, 105 S.Ct. at 1291.

The motivation to speak alone would be no different after indictment. The accused might abandon his rights for any of the same motivational factors outlined in *Elstad*. *See Brewer*, 430 U.S. at 440 (Blackmun, J., dissenting) (persons in custody frequently volunteer statements in response to stimuli other than interrogation). Indeed, in this case Patterson made his motivation clear and it had nothing to do with lacking professional legal skill: he wanted to tell the truth because the victim had been a friend of his. The stimulus to the tell the truth might well have come out of his relationship with his mother. She had visited him at the jail Monday evening, Patterson confessed his role in the murder Tuesday at the very next encounter with police, and then went on to meet with her again after he made his statements.

But the lesson of *Oregon v. Elstad* is that, where there have been no tactics by the police to take advantage of an uncounselled layman, there should be no presumption that the accused was motivated to speak only because he was unequipped to face his adversary. The moral or psy-

cholgical pressures to confess which emanate from sources other than official superiority are not the concern of the Sixth Amendment. Patterson could fully understand his right but still choose for personal reasons to speak without the advice of counsel.

Therefore, the totality of the circumstances do not reveal Patterson as a disadvantaged defendant overpowered by his adversary. Rather, they reveal him as an individual who knew he was in trouble, made a decision on his own to tell the truth, and who was permitted to act on his decision only after the authorities were first certain he knew his options and the consequence of his decision. This gave him the chance to exercise the full scope of the right provided by the Sixth Amendment, including both the right to counsel and the correlative right to dispense with counsel's help. Aware of his choices, he chose the latter and relinquished the former. The Federal Constitution does not forbid use of his confession at his criminal trial.

II.

PATTERSON'S CONFESSION TO THE POLICE IN THE ABSENCE OF COUNSEL AFTER INDICTMENT WAS NOT "DELIBERATELY ELICITED" AND WAS ADMISSIBLE AT TRIAL AS A VOLUNTEERED STATEMENT; THE CONFESSION LATER ELICITED BY THE PROSECUTOR WAS, IN THE ABSENCE OF A VALID *MASSIAH* WAIVER, CUMULATIVE OF THE ADMISSIBLE CONFESSION AND OTHER INCRIMINATING EVIDENCE AND ITS ADMISSION WAS HARMLESS ERROR.

In the event that this Court finds that Patterson did not effectuate a knowing *Massiah* waiver, the confession he gave to the officers was nonetheless admissible as a volunteered statement, not elicited by the authorities, and therefore not in contravention of the Sixth Amendment.

A Sixth Amendment *Massiah* violation occurs only when agents of the government deliberately elicit statements from a formally charged accused in the absence of counsel. *Massiah*, 377 U.S. at 206; *Henry*, 447 U.S. at 273; *Moulton*, 106 S.Ct. at 486; *Kuhlmann*, 106 S.Ct. at 2629. A *Massiah* violation does not occur merely because—by luck or happenstance—the government obtains incriminating statements from the accused after the Sixth Amendment right to counsel has attached. *Henry*, 447 U.S. at 273; *Moulton*, 106 S.Ct. at 487; *Kuhlmann*, 106 S.Ct. at 2629; *see also Edwards*, 451 U.S. at 485-486 (Fifth Amendment right to counsel not violated when police merely listen to volunteered, voluntary statements of accused who has requested counsel). Police may legitimately operate as a "listening post." *Henry*, 447 U.S. at 271, n.9; *Moulton*, 106 S.Ct. at 488; *Kuhlman*, 106 S.Ct. at 2628, n.19.

To make out a *Massiah* violation, the record must demonstrate that the police took some action beyond merely listening that was designed to deliberately elicit incriminating remarks. *Henry*, 447 U.S. at 277; *Kuhlmann*, 106 S.Ct. at 2630; *Brewer*, 430 U.S. at 399. The focus is on whether the State intentionally created the opportunity to circumvent the right and whether the State agent must have known he could obtain incriminating statements. *Moulton*, 106 S.Ct. at 489 and n.12; *Brewer*, 439 U.S. at 399.

This record does not demonstrate a *Massiah* violation when Patterson confessed to the police because the officers took no action to elicit the confession, could not have known that he would make incriminating statements and did nothing more than listen to a few statements, interrupt him to provide him *Miranda* warnings, then continue to listen to his account.

Patterson's first few incriminating statements were made to police officers as they prepared to transport him to the County Jail where he could be arraigned. These statements consisted of his spontaneous questions as to how many people had been indicted and why a fellow gang member named Harmon was not also indicted since "he did everything", and a volitional explanation that a neighbor girl would back him up since Harmon had admitted the murder to her.

Patterson had no chance to volunteer anything more because the officers cut him off and readvised him of his rights using a *Miranda* rights waiver form. Before continuing, the officer had Patterson read over each of the rights with him, initial each warning, and sign the bottom. Then the officer suggested he "continue with what he was telling me before I stopped him." (J.A. 14, R. 732) Patterson continued to speak about the murder for almost 45 minutes, including his own participation in the death. After he finished, the officer called a prosecutor and told him Patterson wanted to speak about the murder. This account was introduced at trial through the testimony of the police officer.

The confession occurred during processing, a non-critical stage in the criminal process involving only neutral, routine government contact. *Brewer*, 430 U.S. at 400 (no constitutional protection is at play if there is no interrogation); *see also Robinson v. Percy*, 738 F.2d 214, 219 (7th Cir. 1984) (processing is not critical stage in the prosecution). There was no causal connection between the processing and the confession. There was no culpable police work. There was no direct questioning.

Rather the confession was initiated by Patterson himself at a time when he wasn't being questioned about anything. (R. 55) He had never requested the presence of

counsel during the two days he was in custody. (R. 45, 782) In fact, during the two days at the stationhouse, Patterson had access to a phone, had used it to call family members, but never phoned an attorney or asked the officers for help in getting him one. (R. 45, 781-782). Inasmuch as Patterson had not yet attended any judicial proceeding, such as arraignment, he had never accepted an attorney's services in court.

The only participation by the government's authorities in the course of the statement was the attempt to honor his constitutional rights to silence and the presence of counsel by interrupting him with his *Miranda* rights. Only after the officers were certain that he was speaking of his own volition did they agree to listen to his involvement in the murder, as well as his explanation that his decision to speak to authorities—without the help of counsel—was made because the victim had been his friend and he wanted to tell the truth. Indeed, this police conduct warranted a commendation from the trial judge for its down-to-earth awareness of Patterson's rights by literally shutting him off when he started to speak. (R. 168-169)

This record demontrates that there was no police overreaching, either "explicit or subtle, deliberate or unintentional." *Smith v. Illinois*, 469 U.S. 91, 99 (1984). There was no Fifth Amendment "interrogation," defined by this Court as words or action by the police that they should know are reasonably likely to elicit an incriminating response. *Innis*, 446 U.S. at 303. Similarly, there was no Sixth Amendment "deliberate elicitation," described by the Court as interrogation or investigative techniques that are the equivalent of interrogation or as action beyond listening to stimulate incriminating remarks. *Kuhlmann*, 106 S.Ct. at 2629-2630.

The police conduct here can be compared to that in *Arizona v. Mauro*, 107 S.Ct. 1931 (1987). In *Mauro*, after the suspect had invoked his *Miranda* right to counsel upon interrogation for the murder of his son, police permitted him a visit with his wife who was also suspect, during which a police officer was present to see and hear what was going on and to run a tape recorder in plain sight on the desktop. During their conversation about their son, the officer interjected two questions addressed to Mauro's wife, including whether there was someone to take care of David's body and whether she wished to talk anymore with her husband. This Court held that Mauro's statements during this conversation were not the product of interrogation or its functional equivalent. *Mauro*, 107 S.Ct. at 1936. The visit was not instigated by the officers nor could Mauro reasonably feel forced to incriminate himself because of the encounter. *Mauro*, 107 S.Ct. at 1936. This conclusion was warranted in light of the essential purpose behind the *Miranda* right: preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment. *Mauro*, 107 U.S. at 1937.

The same conclusion is warranted in this case, in light of the essence of the *Massiah* right: preventing government officials from exploiting its advantage of power to elicit confessions that would not be given by an accused who possessed equal professional legal skill. Patterson's statements were not the result of a display of governmental power or of any action beyond mere listening.

Certainly, the giving of *Miranda* warnings—the very shield against interrogation—was not itself an act of interrogation. This Court has recognized that *Miranda* warnings often effectively "inhibit persons from giving information." *Elstad*, 105 S.Ct. at 1293. It is also certain that

the officer's suggestion at the completion of the warnings for Patterson to proceed was not a ploy designed to encourage him to talk. Patterson was already well into his act of volunteering statements. He needed no encouragement; the officers needed no ploy. Obviously, this suggestion was no more than a statement to let him know that the interruption was over and he could continue talking. It was in the same nature of the officer's question in *Mauro* asking whether there would be any more conversation between the suspects during their visit.

This is the only conclusion that can be drawn from the entirety of the police conduct. Having taken every precaution to observe Patterson's right to counsel, this single suggestion can not conceivably be characterized as "prodding." Such an interpretation would grossly distort the very thing the police were trying to accomplish when they stopped Patterson from confessing. They provided him an opportunity to think first before he said another word. Having given him that choice, Patterson decided to continue out of his stated desire to tell the truth about the murder of a friend. Because Patterson's confession to the police was volitional, volunteered, and voluntary, the Federal Constitution does not forbid its use at his criminal trial.

A second identical confession was also introduced at trial through the testimony of a prosecutor to whom Patterson spoke about an hour or an hour-and-a-half after his encounter with the police officer. The prosecutor first secured Patterson's *Miranda* waiver and further told Patterson that he was not Patterson's counsel but was assisting the police in the investigation of the murder. Patterson said he understood that the prosecutor was helping the police but that he wanted to talk to him

because he wanted to tell the truth. At this point, Patterson repeated the confession.

Obviously, the prosecutor engaged in interrogation or deliberate elicitation but only after first securing what he believed was an effective waiver of the presence of counsel. Should this Court decide that Patterson did not effectuate a valid *Massiah* waiver at this time, use of this evidence was only harmless error. It was cumulative of the admissible, volunteered confession, as well as the additional incriminating evidence in this record such as the testimony of eyewitness Juan McCune which reported Patterson's involvement and, therefore, had no impact on the verdict especially where Patterson did not put on any defense.

Although this Court does not ordinarily undertake its own review of the record to determine the presence or absence of harmless error, *see Rose v. Clark*, 106 S.Ct. 3101, 3109 (1986); *Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1448 (1986); the task is facilitated in this case because the record sets forth all the essential, undisputed facts relevant to the inquiry. *Cf. United States v. Hasting*, 461 U.S. 499, 510 (1983).

CONCLUSION

WHEREFORE, the People of the State of Illinois ask this Court to affirm the judgement of the Illinois Supreme Court and uphold the petitioner's murder conviction.

Respectfully submitted,

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January 25, 1988

REPLY

BRIEF

No. 86-7059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

TYRONE PATTERSON,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari To The Supreme Court of Illinois

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I.

AFTER ACKNOWLEDGING THAT THIS COURT HAS RECOGNIZED A SIXTH AMENDMENT RIGHT TO COUNSEL AT POST-INDICTMENT INTERROGATIONS SEPARATE AND DISTINCT FROM A FIFTH AMENDMENT RIGHT TO COUNSEL THEREAT, THE STATE AND SOLICITOR GENERAL FAIL TO OVERCOME THE LOGICAL CONCLUSION THAT WAIVER PROCEDURES MUST BE SEPARATE AND DISTINCT AS WELL

Both respondent State of Illinois and *amicus* Solicitor General on behalf of the State agree with petitioner Patterson that the decisions of this Court establish a Sixth Amendment right to counsel at police interrogations after indictment independent of a Fifth Amendment right to counsel at such interviews under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). (See Brief for Respondent at pp. 11-12, 17, 19; Brief for Solicitor General at p. 5.) Despite this acknowledgment, both the State and Solicitor General insist the Sixth Amendment right to counsel applicable after indictment can be waived by the same procedures established for waiving the Fifth Amendment right to counsel. (See Brief for Respondent at pp. 16, 21, 22, 23; Brief for Solicitor General at pp. 13, 15, 17, 19, 20, 21, 23.) In so holding, they do not persuasively explain why this Court's deliberate application of distinct Fifth and Sixth Amendment rights to counsel should be ignored under the assumption there is only one right to counsel, governed by a single waiver procedure. In fact, the recognized differences in those rights to counsel suggest there must be, as petitioner demonstrated in his opening brief, different methods of achieving binding waiver.

1. There are indeed two different rights to counsel at questioning sessions with authorities. (*Michigan* v. *Jackson*, 475 U.S. 625, 89 L.Ed.2d 631, 638 (1986)) This Court created in *Miranda* the pre-indictment right to counsel "in order to protect the Fifth Amendment privilege

against self-incrimination rather than to vindicate the Sixth Amendment right to counsel." (*United States* v. *Gouveia*, 467 U.S. 180, 188 n.5 (1984); see also *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972)) For that purpose, it additionally extended the already existing Sixth Amendment right to counsel[1] to post-indictment interrogations (*Brewer* v. *Williams*, 430 U.S. 387, 401 (1977)) but "the policies underlying the two constitutional protections are quite distinct." (*Rhode Island* v. *Innis*, 446 U.S. 291, 300 n. 4 (1980)) This Court reiterated its appreciation of those distinctions in *Jackson*, 89 L.Ed.2d 631 at 641 n. 7. The State here accepts this difference (Br. at. p. 19) but, because branded "subtle", assumes it irrelevant and incomprehensible to a defendant. Indeed, to the "unschooled" defendant, only a "right to counsel" exists. (Br., p. 20) The critical point is there are distinctions. The fatal flaw is keeping them "subtle". It is the explanation of the distinctions which is compelled before a waiver of the Sixth Amendment right to counsel can be called knowing and intelligent. These distinct policies mean, contrary to claims of the State (Br., p. 15) and Solicitor General (Br., p. 13), that the right to counsel before and after indictment can be appropriately compared, with the post-indictment counsel being considered greater.[2]

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[1] The State seeks (p. 16) to equate the *Miranda* right to counsel with the *Massiah* right to counsel as both being judicial creations. In fact, this Court did judicially enact a Fifth Amendment right to counsel which does not exist in the Constitution. By contrast, the Sixth Amendment does contain an explicit counsel provision which was merely extended by this Court to critical pretrial stages.

[2] In fact, the Solicitor General itself in its brief ranks the right to counsel before and at trial. It deems trial counsel "the 'core' right guaranteed by the Sixth Amendment" whereas pre-trial counsel is viewed "a less central component of the Sixth Amendment right to counsel". (Br. at p. 14) Petitioner thus does no more than the Solicitor General, placing the "core" post-indictment right to counsel higher than the "less central" pre-indictment right to a lawyer.

In considering the two rights to counsel, analysts have rejected the views of the State and Solicitor General that they are equal. Rather, the "sixth amendment right is thought a more broad and fundamental right to counsel" and "the judicially created fifth amendment right to counsel does not provide protections as broad or as important as those provided by the sixth amendment right". (Parker, *Proposed Requirements for Waiver of the Sixth Amendment Right to Counsel*, 82 Col.L. Rev. 363 at 372 n. 56, 375 (1982) (hereafter *Requirements*)) In comparison, "the sixth amendment right to counsel provides broader protection than the fifth amendment right to counsel". (Wasserman, *Sixth Amendment Right to Counsel: Standards for Knowing and Intelligent Pretrial Waivers*, 60 B.U.L.Rev. 738, 747 n. 70 (1980) (hereafter *Standards*)) Truly, "the protection afforded defendant by *Miranda* is both different and less broad than the protection afforded by the sixth amendment right to counsel" (White, *Book Review, Police Interrogation and Confessions: Essays in Law and Policy*, Yale Kamisar, 129 U.Pa.L.Rev. 994, 999 (1981)) and, therefore, "when the sixth amendment right attaches, the fifth amendment right is effectively eclipsed." (Wasserman, *Standards*, 60 B.U.L. Rev. at 747 n. 70) The protections of the Sixth Amendment counsel "render unnecessary the safeguards of the fifth amendment right to counsel". (Parker, *Requirements*, 82 Col.L.Rev. at 372 n. 56) Essentially, the right to counsel after indictment is the Sixth Amendment right, not the Fifth Amendment right, and, therefore, no Fifth Amendment waiver procedure is appropriate. This Court should likewise insist that the applicable right to counsel at questioning after indictment is provided by the Sixth Amendment.

2. The greater purposes which Sixth Amendment counsel serve at interrogations after indictment have

been recognized by this Court, distinctions which are jeopardized if the arguments of the State and Solicitor General prevail. Agreeing that a single pre-indictment *Miranda* right to counsel applies at interrogations after indictment would undermine the continued application of the Sixth Amendment right to counsel at such interrogations.

As the State has acknowledged in its brief (p. 12), counsel in the adversarial setting of post-indictment interrogations serves as defendant's "medium", assisting him in meeting society's prosecutorial forces. This Court has so characterized counsel's value (*Maine* v. *Moulton*, 474 U.S. 159, 88 L.Ed.2d 481, 496 (1985)) and has stressed "the right to counsel exists to protect the accused during trial-type confrontations with the prosecutor". (*Gouveia*, 467 U.S. 180 at 190) It has only been after the filing of charges that interrogations have been considered "parts of the trial itself" (*United States* v. *Ash*, 413 U.S. 300, 310 (1973)), an indication counsel's presence at such questioning (unlike prior to the initiation of charges) serves the similar purposes of counsel at trial. Only after indictment is the accused deemed "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both" (*Ash*, 413 U.S. at 310) and, so, only after indictment must he have trial counsel to protect him.

In *Ash*[3], this Court explained that after indictment counsel functions "essentially the same as" he does in

[3] The Solicitor General (Br., p. 20) suggests this Court's declaration in *Ash* that after indictment counsel could have advised "on the benefits of the Fifth Amendment" and sheltered accused from overreaching indicates an equation of Fifth and Sixth Amendment counsel. It was not the position of this Court then or thereafter that this was the limit of counsel's function at questioning after indictment.

court: "a spokesman for, or advisor to, the accused." (413 U.S. at 312) After the filing of formal charges, "the attorney no longer serves merely as a defensive shield to protect the suspect from self-incrimination, but becomes the accused's representative in conflict with the mobilized prosecutorial forces of the state." (Parker, *Requirements*, 82 Col.L.Rev. 363, 372) Under the broad protection of the Sixth Amendment right to counsel, this Court extended "the help of a lawyer" to citizens at interrogation after indictment (*Estelle* v. *Smith*, 451 U.S. 454, 469-70 (1981)) and in *Barrera* v. *Young*, 794 F.2d 1264, 1271 (7th Cir. 1986), the court concluded the "right under the sixth amendment to counsel" was "a right to the services of a lawyer as a go-between, if the suspect wishes to deal with the police only through counsel". To gain such services (under the Fifth Amendment) in interrogation sessions prior to indictment, this Court has demanded the accused invoke his right to counsel. (See *Edwards* v. *Arizona*, 451 U.S. 477, 484-5 (1981).) By contrast, this Court has created no such need to demand the Sixth Amendment right to counsel. Rather, it arises automatically at the time of indictment and, thus, as here, applies automatically at interviews thereafter. (See *Brewer* v. *Williams*, 430 U.S. 387, 404; *Jackson*, 89 L.Ed.2d 631 at 640 n. 6.) The fact the right attaches automatically without any obligation to request it surely signifies this Court deems the Sixth Amendment guarantee of counsel to be more critical than a Fifth Amendment right to counsel.

3. In claiming that counsel under the Fifth and Sixth Amendments are identical, the State and Solicitor General fail to appreciate the heightened importance accorded to counsel after the filing of the indictment. Contrary to this Court's clear proclamation (*Kirby*, 406 U.S. 682, 689) that the initiation of criminal proceedings is

significant, indictment is, to them, "a mere formalism." This Court has viewed the onset of criminal proceedings such as the indictment here as the dividing line between application of the "limited right" to counsel under *Miranda* and the broader "Sixth Amendment right to the assistance of counsel". (*Estelle* v. *Smith*, 451 U.S. 454, 470 n. 14; see also *Jackson*, 89 L.Ed.2d 631 at 638) The filing of the charges here demonstrated conclusively that, rather than the pre-indictment Fifth Amendment right to counsel, the Sixth Amendment right applied at petitioner's contacts with the authorities. It simply cannot be waived as though it was a *Miranda* right to counsel.

4. Certainly, as all agree[4], what must be demonstrated for a valid waiver is a "knowing and intelligent" loss of the right to counsel. Proceeding on the mistaken assumption that only a single counsel right exists, the State and Solicitor General mistakenly conclude a common waiver procedure is appropriate. *Miranda* warnings, asserted to be the proper balance between interests of society and the rights of the accused (Brief for the State at p. 25, Brief for Solicitor General at p. 18), simply do not reflect such a proper balance after the initiation of adversary criminal proceedings.

The warnings articulated in *Miranda* were primarily designed to dispel the perceived pervasive aura of compul-

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[4] Both the State (p. 14) and the Solicitor General (pp. 8-9) concur with petitioner's assertion in his opening brief that the proper waiver standard is that in *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). The State, though, mistakenly suggests that petitioner is advocating some "higher" standard for waiver of Sixth Amendment counsel. In fact, the waiver test is the same but there is a heavier or higher burden on the State to meet that standard once, as here, the Sixth Amendment right to counsel applies. (See Wasserman, *Standards*, 60 B.U.L.Rev. 738 at 747; Parker, *Requirements*, 82 Col.L.Rev. 363, 386 n. 157.)

sion inherent in custodial interrogation. (*Schneckloth* v. *Bustamonte*, 412 U.S. 218, 247 (1973)) As such, the only "interest" of the suspect protected by *Miranda* warnings in interrogation prior to indictment is freedom from an atmosphere of police or prosecutorial domination. (See Wasserman, *Standards*, 60 B.U.L.Rev. 738, 742-3.) In contrast, the recognized interests of indicted citizens at post-indictment interrogations are greater than merely a relaxation of the tensions surrounding custodial interrogations. For them, the trial process has begun and they need and are entitled to a lawyer and, so, a more thorough explanation of that right if expected to waive it. (See *United States ex rel Johnson* v. *Lane*, 573 F.Supp. 967, 975 (N.D.Ill. 1983) on changed position of defendants after indictment.) Contrary to claims of the Solicitor General (Br. at pp. 21, 22) that interests before and after the indictment are the same, the scale on defendant's side of the balance is certainly much higher.

On the other hand, the State's scale in the post-indictment balance is considerably lower. Although the State (Br., p. 25) and Solicitor General (Br., pp. 19, 20 n. 9) stress the need for confessions after indictment, there remains as acknowledged fact a lesser need for police interrogation after charges are filed. In fact, the Solicitor General previously evaluated this very argument that continuing an "investigation of crimes as to which charges were already pending" required interrogations and conceded it presented "an inadequate justification" for such questioning. (*Moulton*, 88 L.Ed.2d 481, 498 n. 15) This rationalization is equally inadequate justification here for demanding easy access to an indicted citizen. Others likewise agree.

In his work, author Parker stressed that since "the filing of formal charges presumably indicates that the

police have solved the crime at issue, society's need to protect public safety by obtaining confession of the crime is reduced." (*Requirements*, 82 Col.L.Rev. 363 at 387 n.162) And the district court in *Lane* equally agreed:

> "In contrast to the Fifth Amendment right to counsel, there are no countervailing urgent governmental investigatory interests in further interrogation of the accused once the Sixth Amendment has attached. Presumably, the government has, at the time a formal charge has been filed, enough evidence to establish a *prima facie* case against the accused. Thus, the conciliation of interests by the court in formulating the *Miranda* rule does not come into play once the Sixth Amendment right to counsel arises." (573 F.Supp. 967 at 975)

(See also *United States* v. *Mohabir*, 624 F.2d 1140 at 1148-9 (2nd Cir. 1980) observing that since the indictment indicates legally sufficient evidence of guilt, necessities of police investigation to solve the crime cannot be urged as justification for any subsequent questioning of the defendant.)

Under the circumstances of defendant's heightened need for counsel and the government's reduced need to interrogate, it can hardly be said as is claimed here that the pre-indictment "balance" reflected in *Miranda* sensibly continues once charges are filed. The analysis urging that conclusion is patently unsound.

Equally unpersuasive is the stated fear that an expected increase in use of counsel at post-indictment interrogations will disrupt effective law enforcement. (Br. for the State at p. 24; Brief for Solicitor General at pp. 19, 26) The perception of counsel as some impediment to the criminal process has been viewed as inaccurate. In fact, the involvement of counsel is seen as a way to encourage

plea bargaining and guilty pleas. (See Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 Yale L.J. 1000, 1049 (1964).) One cited study revealed "that even when the accused's attorney was present, the attorney in many cases advised his client to confess or otherwise to cooperate with police, usually in hope of obtaining leniency for his client." (Parker, *Requirements*, 82 Col.L.Rev. 363, 389, n. 171) Therefore, as "it is not uncommon for a counseled defendant to confess and plead guilty; the high rate of guilty pleas attests to that" (*Mohabir*, 624 F.2d 1140, 1153), there need be no unsettling fears that successful law enforcement is jeopardized by protecting defendants' Sixth Amendment right to counsel.

5. The State (Br. at p. 23) cites a series of cases it suggests compels the conclusion that *Miranda* warnings do assure a knowing and intelligent waiver of Sixth Amendment counsel at interrogation after indictment. The Solicitor General (Br. at pp. 10-11 n. 4) likewise offers case law on the sufficiency of *Miranda* warnings. The cases, however, are critically distinct from the facts in this cause. In those situations, the accused had already become acquainted with counsel after indictment who had entered the case through appointment or retention and with whom the defendant had had contact.[5] With such communication, missing here, it becomes more likely the defendant realizes he has a right to counsel after indictment to protect his interests and, so, foregoes it knowingly if he speaks to authorities without him. In this case,

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[5] The only exception is the Solicitor General's case of *United States* v. *Payton*, 615 F.2d 922 (1st Cir. 1980). Yet, there, the defendant was deemed well aware of his rights and how to use them since he threatened to terminate questioning if it became too specific. No such sophistication has been shown present here.

petitioner had had no such encounter with retained or appointed counsel before the questioning by which to gain, as in the State's and Solicitor General's cases, an appreciation of the right to counsel. Since "an accused without counsel is *less* likely to comprehend his sixth amendment right than an accused who has already engaged either retained or appointed counsel" (Wasserman, *Standards*, 60 B.U.L.Rev. 738 at 758) and petitioner was without counsel here, he was not likely to sufficiently comprehend his Sixth Amendment right merely through *Miranda* warnings. The cases of the State and Solicitor General differ and do not compel the finding of adequate waiver here.

No decision of this Court has accepted *Miranda* warnings as sufficient to create an effective waiver of Sixth Amendment counsel. Although both the State (Br., pp. 20, 26) and Solicitor General (Br., p. 11) cite the dissenting opinion in *Brewer* v. *Williams* implying *Miranda* warnings waive post-indictment counsel, that holding was not in fact adopted in that case.[6] (See Wasserman, *Standards*, 60 B.U.L.Rev. 738 at 753 n. 116.)

6. The dissatisfaction expressed with petitioner's cases holding *Miranda* warnings insufficient to assure an effective waiver of post-indictment counsel is not convincing. The State (Br. at pp. 24, 25, 26) complains petitioner's cases overprotect in a paternalistic fashion which is damaging to police. In truth, all petitioner's authorities (cases and law review articles) permit a waiver of counsel but, as it should be, knowingly and intelligently. Petitioner's authorities persuasively address the new positions of the parties after indictment and correctly reject as a method of waiver mere reliance on the vague and generalized allusions in *Miranda* to the imprecise right to counsel. Those authorities realized the situation after indictment is not what confronted this Court in *Miranda* and refused to be bound by that procedure. It is only sensible this Court agree and not be confined to *Miranda* warnings in articulating post-indictment waiver procedure.

[6] Nor did this Court indicate in *Jackson*, when it had the opportunity, that *Miranda* warnings could be used to validly waive the Sixth Amendment right to post-indictment counsel. (89 L.Ed.2d 631 at 642 n. 10)

Since indicted, petitioner found himself beyond a mere *Miranda* setting but not yet on trial. It was essential therefore that, while perhaps as the Solicitor General (p. 14) and State (pp. 26, 27) suggest, the advice need not be as detailed as appropriate for waiving counsel at trial, more than the routine method sanctioned in *Miranda* occur. The waiver procedure at post-indictment interviews must approach that suitable for trial. (See *Lane*, 573 F.Supp. 967, 975; *Mohabir*, 624 F.2d 1140, 1151; Wasserman, *Standards*, 60 B.U.L.Rev. 738 at 760.) After indictment, *Miranda* techniques do not control.

7. The proper waiver procedure for indicted citizens should follow *Edwards* and *Jackson*. The Solicitor General emphasizes that in *Jackson* the holding in *Edwards* was deemed applicable due to demand for counsel and thus suggests it does not govern here merely because an inidictment has been secured. (Br., pp. 5-6) In *Jackson*, this Court first reiterated that the Sixth Amendment right to counsel applies after indictment without the necessity of such a demand. (89 L.Ed.2d 631 at 640 n.6) It then applied the *Edwards* protection to the Sixth Amendment right to counsel. (89 L.Ed.2d at 636, 642)

The return of the indictment in petitioner's case functioned essentially like the request for counsel in *Edwards*

and *Jackson*. Either by personal choice (*Edwards; Jackson*) or by operation of law (following indictment), the right to counsel becomes interposed between the defendant and authorities as a means of protecting him and his rights. It requires in both cases authorities respect that right to counsel and ensure the accused does not unwittingly forego that protection. In *Edwards*, this Court explained that where counsel is invoked by defendant he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates" a dialogue with police. (451 U.S. at 484-5) Similarly, where the indictment itself invokes counsel for defendant, police cannot interrogate the defendant in counsel's absence unless defendant approaches the authorities.

No such initiation of contact with police was shown present here, contrary to claims by the State (Br., p. 28) and Solicitor General. (Br., p. 26)

Clearly, the first meeting between petitioner and police following indictment occurred when the officer visited petitioner to tell him he had been indicted. (J.A. 6) Although petitioner responded, he merely inquired on the subjects indicted. (J.A. 7) Following a brief discussion on this matter, the officer spoke the *Miranda* warnings and told petitioner to continue talking. (J.A. 7-8) It was thereafter that petitioner made his incriminating statements.

Rather than initiating contact, petitioner here was responding to the announcement of his indictment. The developed facts resemble the occurrences in *Brewer* v. *Williams* where, as here, defendant and the authorities undertook a discussion of the investigation, police acted to encourage a statement, and defendant responded with his confession. (See Kamisar, *Brewer* v. *Williams*, *Massiah* and *Miranda: What is 'Interrogation'? When Does it Matter?*, 67 Geo.L.J. 1, 8-9 (1978).) Petitioner's statements after the officer's directive to continue cannot be upheld as admissible due to petitioner initiating the contact.[7]

8. In addition to the *Edwards* protection, there are a variety of other waiver procedures available to protect petitioner's Sixth Amendment right to counsel. As in *United States* v. *Mohabir*, 624 F.2d 1140 at 1153, a judge in court could supply advice beyond *Miranda* warnings to the defendant whenever police seek to question him after indictment. The admonishments need not be formulated by this Court but may be left to the discretion of the judge based on the experience and intelligence of the defendant and the particular situation. (See Wasserman, *Standards*, 60 B.U.L.Rev. 738, 761.) But at a minimum the disclosures must convey the gravity of the accused's situation and his right under the Sixth Amendment to the broad protection of counsel after indictment. Alternatively, this Court could articulate the proper and appropriate admonishments (see for specifics *United States* v. *Callabrass*, 458 F. Supp. 964, 966-7 (S.D.N.Y. 1978), *Mohabir*, 624 F.2d 1140, 1152 n. 12 (approving *Callabrass)*, 1153 and Wasserman, *Standards*, 60 B.U.L.Rev. at 762-3). It is preferred these specific admonishments be expressed by the judge (see *Mohabir*, 624 F.2d 1140 at 1152, 1153) but they could be conveyed by the interrogators. (See Wasserman, *Standards*, 60 B.U.L.Rev. at

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[7] The Solicitor General does not contend petitioner's later interrogation was initiated by petitioner. Nor does it claim the improper use of such an inadmissible confession was merely harmless error. The State does claim harmless error on the related issue of volunteered statements to police. It is disposed of herein in Argument III. Grounds for retrial remain.

762-3.) Should the indicted defendant have had contact with a lawyer, as in the State's cited cases, *Miranda* warnings could suffice to waive that counsel at interrogations. And the actual presence of counsel would protect the accused at such questioning. If admonishments are appropriate, this Court must insist upon the clear comprehension by the indicted accused of the Sixth Amendment right to counsel. That and nothing else constitutes a valid knowing and intelligent waiver.

9. The State's attempt to portray the environment as one in which petitioner was well-off (Br., pp. 29-30) is unavailing. Petitioner, 17 years old (Tr. 35, 115) was kept confined to a suburban Chicago police station for 3 days and 2 nights (Tr. 44-5, 125), spending nearly all his time in a jail cell 6 ft. by 5 ft. (Tr. 46) with concrete floor and walls (Tr. 46-7), a metal bed with thin padding (Tr. 47), a light constantly shining (Tr. 61, 123, 124, 128), and lacking blankets, towels, diversions (Tr. 49, 123), hot water, and a toilet seat. (Tr. 123) The State's suggestion such confinement somehow contributed to a knowing waiver of counsel is not impressive.

The State notes petitioner never sought counsel (Br. at p. 29), indicative perhaps merely of his unfamiliarity with that right. It cites his awareness of being interrogated by government agents (p. 30) which simply adds to his need to confront such government representatives with a representative of his own. Its dubious assumption he knew a request for counsel would be honored (p. 30) rests completely on speculation. Certainly the prosecution at the suppression hearing never learned from petitioner during his testimony that he expected his rights would be respected. None of the State's points contributes in any meaningful way to the conclusion petitioner's surrender of

his Sixth Amendment right to counsel was knowing and intelligent.

At neither session with the authorities has the State, relying merely on *Miranda* warnings, sustained its heavy burden of proving a valid knowing and intelligent waiver of petitioner's post-indictment Sixth Amendment right to counsel. Therefore, none of those statements has been shown properly admitted at petitioner's criminal trial. As a result, and to thereby protect the valued Sixth Amendment right to counsel, he must be retried.

II.

THE STATE'S ASSERTION OF VOLUNTEERED STATEMENTS IS WAIVED FOR FAILURE TO ARGUE BELOW AND IS UNSUPPORTED BY THE FACTS

For the first time on appeal, the State argues that petitioner's statements to police officer Gresham were admissible as volunteered, without regard to whether counsel was validly surrendered. (Br., pp. 32-7) Review of the decisions in both the Illinois appellate court (J.A. 26-35) and Illinois Supreme Court (J.A. 36-48) shows clearly this contention has never before been presented in this appeal. Therefore, it is waived and need not be considered by this Court. (See *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Shadwick* v. *City of Tampa*, 407 U.S. 345, 352 (1972); *Beck* v. *Washington*, 369 U.S. 541, 553-4 (1962).)

Even considering it, however, the facts show the petitioner did not volunteer his confession. As noted here, petitioner queried the officer on who had been indicted and volunteered information on another's guilt. (J.A. 6-7) Thereafter, petitioner was warned and directed by the officer to continue talking. (J.A. 8) This is unlike the situation prior to indictment, as in the State's proposed

authority of *Arizona* v. *Mauro* (Br., p. 36) since only interrogation or its equivalent is banned. After indictment, deliberate elicitation of statements is prohibited. (*Massiah* v. *United States*, 377 U.S. 201, 206 (1964); *United States* v. *Henry*, 447 U.S. 264, 271, 274 (1980); *Maine* v. *Moulton*, 474 U.S. 159, 88 L.Ed.2d 481, 495 n. 11) The officer's order, mandatory in nature, to continue speaking eliminated any element of voluntariness in petitioner's subsequent disclosures. Consequently, this Court cannot, as the State wishes, view petitioner's remarks to the officer as volunteered and, so, properly admitted at trial.

III.

ASSUMING PETITIONER'S STATEMENTS TO THE OFFICER WERE ADMISSIBLE AS VOLUNTEERED, THE STATE HAS NOT DEMONSTRATED THEY RENDERED HARMLESS THE IMPROPER ADMISSION OF HIS OTHER STATEMENTS TO AUTHORITIES

The State then insists that, assuming petitioner's statements to the officer were volunteered, use of later inadmissible statements to the prosecutor was harmless error. (Br., pp. 37-8) Along with the argument petitioner's disclosures were volunteered, this contention too is raised for the first time in this Court and likewise could be considered waived. If this Court does address it, it should reject it.

The test for harmless error established by this Court is not whether adequate evidence exists to convict apart from the testimony challenged as inadmissible but whether a reasonable possibility arises the contested proof might have contributed to the conviction. (*Fahy* v. *Connecticut*, 375 U.S. 85, 86-7 (1963); *Chapman* v. *California*, 386 U.S. 18, 23 (1967)) Where a reviewing court

cannot say the inadmissible evidence was not a contributing factor to a conviction, the court must order retrial. (See *Anderson* v. *Smith*, 751 F.2d 96, 105-6 (2nd Cir. 1984); *Thompson* v. *Leeke*, 756 F.2d 314, 316 (4th Cir. 1985); *United States* v. *Porter*, 764 F.2d 1, 7 (1st Cir. 1985); *United States* v. *Christian*, 571 F.2d 64, 69-70 (1st Cir. 1978).) The same is true in cases involving, as here, multiple statements. (*People* v. *Bladel*, 421 Mich. 39, 365 N.W.2d 56, 73 (1984) affd *Michigan* v. *Jackson*, 89 L.Ed.2d 631 (1986); *Felder* v. *McCotter*, 765 F.2d 1245 (5th Cir. 1985))

In *McCotter*, the court stated the "thesis that two confessions do no more harm than one is ingenious, but one we have never adopted." (765 F.2d at 1250) In that case, as here, one brief statement was followed by one containing more detail. The court compared them and determined harm was "demonstrable" from use of both confessions given "the weight that a jury might put on the later written and signed statement." Since the State could not show the admission of the detailed confession was harmless beyond a reasonable doubt, the court agreed defendant should be retried. (765 F.2d 1245, 1251) This case is similar.

Here, the first disclosures were brief and lacking detail (J.A. 14-15) In contrast, the later revelations were involved and much more precise. (J.A. 19-24) Therefore, the State's description of the later confession as simply cumulative and identical to the previous one is inaccurate. It is in fact much more damaging and, thus, can be said to be reasonably likely to have contributed to the conviction. Its introduction cannot be said to be harmless error. For its use alone, then, petitioner should be retried.

CONCLUSION

Wherefore petitioner respectfully requests, for the reasons asserted herein, this Honorable Court reject the contentions of the State and Solicitor General and order that petitioner receive retrial.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 86-7059

In the Supreme Court of the United States

OCTOBER TERM, 1987

TYRONE PATTERSON, PETITIONER

v.

STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether petitioner's voluntary statements should be suppressed on the ground that petitioner did not effectively waive his Sixth Amendment right to the assistance of counsel at the post-indictment interrogations.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The issue in this case is whether the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), supply a suspect with the information needed for an effective waiver of the Sixth Amendment right to the assistance of counsel for purposes of post-indictment interrogation. The Court's analysis and resolution of the question whether additional information must be provided to suspects in this setting is likely to have an effect upon the conduct of interrogations by federal law enforcement officers and the admission of voluntary statements in federal prosecutions.

STATEMENT

1. Early in the morning of August 21, 1983, petitioner became involved in a gang fight at the 1623 Club in Evanston, Illinois. The fight pitted several members of the Vice Lords and an allied gang—David Thomas, Carl Harmon, Juan McCune, and petitioner—against members of

a rival gang, the Black Mobsters. After the fight, the Vice Lords went to Thomas's house. Approximately ten minutes after they arrived, James Kevin Jackson, a member of the Black Mobsters, drove by Thomas's house. Thomas, McCune, Harmon, and petitioner stopped Jackson's car and administered a severe beating to Jackson, repeatedly kicking and hitting him in his head and body. They then put Jackson into the back seat of his car and drove to the end of a nearby dead-end street. J.A. 27, 37.

When they arrived at the end of the street, petitioner and Harmon pushed Jackson out of the car, and Harmon threw him face down into a puddle of water. Thomas suggested that they throw Jackson into a sanitary canal that ran near the street. Harmon and petitioner then instructed McCune to get a knife. McCune drove away and did not return. Later that morning, the police found Jackson's body in a puddle of water near the canal. J.A. 37-38.

McCune, Thomas, and petitioner were separately arrested later that day on charges stemming from the fight at the 1623 Club. McCune waived his *Miranda* rights and gave a statement admitting his involvement in the fight and the murder of Jackson; he also implicated petitioner, Thomas, and Harmon in the murder. J.A. 38; see also Tr. 4-6, 716-719.

After petitioner was arrested, he was questioned by Officer Michael Gresham. At the outset of the interview, Gresham read the *Miranda* warnings to petitioner. Petitioner stated that he understood his rights and gave a statement regarding the fight at the 1623 Club. Petitioner asserted, however, that he did not know anything about the Jackson murder. Petitioner remained in police custody overnight. J.A. 38; Tr. 10-12, 33, 720-723.

The next day, August 22, Thomas and McCune were interviewed by Assistant State's Attorney Robert Friedman. Thomas at first waived his *Miranda* rights and answered

the prosecutor's questions, but in the middle of the interview he refused to answer any more questions and asserted his right to counsel. Friedman also questioned McCune, who again gave a statement implicating petitioner, Thomas, Harmon, and himself in the murder of Jackson. Later that evening, a police officer told petitioner that he had been implicated in the murder and that "charges were either approved or that the police were seeking charges at that time." J.A. 38-39.

On August 23, petitioner, McCune, and Thomas were indicted for Jackson's murder. When Officer Gresham informed petitioner of the indictment, petitioner asked how many individuals had been indicted. When he found out that Harmon had not been indicted, petitioner asked "why wasn't he indicted, he did everything." Petitioner further stated that Harmon had admitted his involvement to a woman named Dorisa. Tr. 21, 59, 729-730; see also J.A. 39. Gresham immediately readvised petitioner of his *Miranda* rights by giving petitioner a printed form bearing the *Miranda* warnings and by reading the warnings aloud. Petitioner initialed the warnings and signed the portion of the form containing the waiver of rights. Tr. 21-22, 730-732. Petitioner then gave a statement implicating himself in the murder. See Tr. 22-23, 732-734.

Assistant State's Attorney George Smith interviewed petitioner later that same day. Petitioner confirmed that he had signed the *Miranda* waiver form given to him by Officer Gresham and that he understood his rights at the time he signed the form. Smith again advised petitioner of his *Miranda* rights and petitioner repeated his account of Jackson's murder. J.A. 40; see also Tr. 74-78, 795-797, 812-813.

2. Prior to the trial, petitioner moved to suppress the statements that he had made to Gresham and Smith. The trial court denied the motion (Tr. 168-169). The statements were introduced at trial (Tr. 731-734, 812-813),

and petitioner was convicted of murder. He was sentenced to 24 years' imprisonment. J.A. 36.[1]

The intermediate state appellate court affirmed petitioner's conviction (J.A. 26-35). It rejected petitioner's claim that he had not effectively waived his Sixth Amendment right to the assistance of counsel, stating that petitioner "knew he was under indictment for murder, so he was aware of the gravity of his legal situation. Because he had been given *Miranda* warnings, he was informed of his right to have an attorney present during questioning. These facts and circumstances are sufficient to show that [petitioner] intelligently waived his known right to counsel before making his statements to police" (J.A. 30).[2]

3. The Supreme Court of Illinois unanimously affirmed petitioner's conviction (J.A. 36-48). Relying on its prior decision in *People* v. *Owens*, 102 Ill. 2d 88, 464 N.E.2d 261, cert. denied, 469 U.S. 963 (1984), the court rejected petitioner's argument that "the State must satisfy a higher burden to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel than is necessary to establish a waiver of the right to counsel guaranteed by *Miranda*" (J.A. 42). The defendant in *Owens* had been advised of his *Miranda* rights prior to the interrogation and was aware that he was being held in connection with a murder investigation. The Illinois Supreme Court held that those facts were sufficient to establish a valid waiver. It stated that the defendent "was aware of the severity of the situation facing him and, since he had been given his *Miranda* warnings, he knew he had the right to have an attorney present during questioning. Considering

[1] Petitioner's co-defendant David Thomas was also convicted of murder; Juan McCune pleaded guilty before trial to the charge of concealment of a death. J.A. 36.

[2] The court also rejected petitioner's claim that his statements were involuntary (J.A. 30-32).

these facts, together with defendant's familiarity with the *Miranda* warnings, we have no doubt of the admissibility of the statements" (*People* v. *Owens*, 102 Ill. 2d at 102-103, 464 N.E.2d at 267).

In the present case, the court found that petitioner was "aware of the gravity of his situation" because he learned that he had been indicted on the murder charge before he gave his statements to Gresham and Smith (J.A. 43). The court further found that petitioner "understood his constitutional rights before he gave his statements" by virtue of the fact that he was advised of his *Miranda* rights and indicated that he understood those rights (*ibid.*). Therefore, the court concluded, petitioner "knowingly and intelligently waived his sixth amendment right to counsel" (J.A. 44).

SUMMARY OF ARGUMENT

The *Miranda* warnings that petitioner received prior to each of his confessions provided him with the information necessary for an effective waiver of his Sixth Amendment right to have counsel present during those interrogations. To be sure, the Sixth Amendment right to counsel is not identical to the right to counsel provided in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and for that reason, the Sixth Amendment waiver test is not identical in all respects to the waiver inquiry under *Miranda*. In the context of post-indictment interrogations, however, the test should ordinarily be the same.

A defendant who faces a decision whether to talk to the police after indictment is in much the same position as a suspect who faces a similar decision prior to the filing of formal charges. In both cases, there is some prospect that the individual will be able to help himself by speaking with the authorities, but there is also a risk that he will hurt himself by doing so. In both cases, the individual may be overmatched by trained interrogators, and he may not

recognize when he is making admissions that will be very damaging to him at trial. Under those circumstances, the Court in *Miranda* concluded that a suspect in a pre-indictment interview setting could validly waive his rights as long as he was told that he had a right to remain silent and a right to have counsel present before questioning, and as long as he was advised of the consequences of his waiver – that anything he said could be used against him in court. In the closely analogous setting of post-indictment interrogation, those warnings serve the same purpose: they apprise the defendant of everything he needs to know in order to make a knowing waiver of his Sixth Amendment right to counsel.

Petitioner argues that the warnings sufficient for pre-indictment interrogations do not suffice for post-indictment interrogations for two reasons: because the need for counsel is greater at a post-indictment interrogation, and because the Sixth Amendment right to counsel is more important than the right to counsel that is conferred by this Court's decision in *Miranda*. Neither argument is persuasive.

It is true that, after indictment, the proceedings change in character from investigative to accusatory. For that reason, it may be less likely in the post-indictment setting that the accused can help himself by what he says. Yet that does not explain why it should be more difficult for the accused to waive counsel in that setting than in the pre-indictment context. For purposes of the waiver inquiry, nothing is different. The right is still the same – the right to counsel – and the unfavorable consequences of its waiver are still the same – the risk that the accused will create evidence against himself. The fact that it may be more likely in the post-indictment setting that the consequences will turn out to be unfavorable for the accused goes to the wisdom of the waiver, not to whether it was knowingly made. Accordingly, there is no reason that the

advice given by the police in the pre-indictment stage should not suffice in the post-indictment stage as well.

There is also no force to petitioner's second argument – that the rights granted by the Sixth Amendment are more important than the rights created by the Court in *Miranda*, and that a waiver of the former should therefore require more elaborate procedures than a waiver of the latter. That argument misses the point of the waiver inquiry. This Court has not created a sliding scale of waiver, in which rights thought to be of secondary concern are readily found to be waived, while waiver is more grudgingly found in the case of rights that are thought to be more important. Instead, the validity of a waiver turns on the content of the right being waived. If the right is a simple one and the consequences of foregoing it are obvious, the waiver inquiry need not be exhaustive. On the other hand, if the right at issue is complex and the consequences of waiver unclear, a more detailed inquiry may be required.

That analysis explains the difference between the waiver inquiry when the right at issue is the right to counsel at trial, as opposed to the right to counsel at a pretrial interrogation. Because the defendant's right to the assistance of counsel at trial is somewhat complex, the Court has required, as a prerequisite to a valid waiver, that the individual be given a relatively detailed explanation of just what he is surrendering by proceeding pro se or with counsel who is burdened by a conflict of interest. When the issue is the assistance of counsel at an interrogation, on the other hand, the risks facing the suspect are much more easily explained. Advising the suspect of his right to counsel and warning him that if he waives the right he may produce evidence that could be used against him therefore provides a sufficient foundation for upholding a subsequent waiver as voluntary and informed.

ARGUMENT

PETITIONER'S STATEMENTS DURING THE POST-INDICTMENT INTERROGATIONS WERE PROPERLY ADMITTED INTO EVIDENCE

Under this Court's decisions, it is clear that petitioner had the right to the assistance of counsel at the post-indictment interrogations that resulted in his two inculpatory statements. Although the "core purpose" of the Sixth Amendment right to counsel is to assure that the accused has the assistance of counsel at trial (*United States* v. *Ash*, 413 U.S. 300, 309 (1973)), the Court has extended the right to counsel to "certain 'critical' pretrial proceedings" that occur after the commencement of adversary judicial proceedings (*United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984)). The Court has made clear that a post-indictment interrogation is one such critical proceeding. *Michigan* v. *Jackson*, 475 U.S. 625, 629-630 (1986); *Brewer* v. *Williams*, 430 U.S. 387, 401 (1977). Moreover, the Sixth Amendment right to counsel is applicable without the need for a request by the defendant. See *Brewer* v. *Williams*, 430 U.S. at 404; *Carnley* v. *Cochran*, 369 U.S. 506, 513 (1962). For that reason, petitioner was entitled to the presence of an attorney during the two post-indictment interrogations unless he validly waived that right.

To establish that petitioner waived his right to the assistance of counsel at interrogation, the prosecution was required to prove " 'an intentional relinquishment or abandonment of a known right or privilege.' " *Brewer* v. *Williams*, 430 U.S. at 404 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). That inquiry has two components. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986); see also *Edwards* v. *Arizona*, 451 U.S. 477, 482 (1981).[3]

The first part of the waiver test was plainly satisfied here. There is no question that by signing the waiver form petitioner decided to relinquish his right to counsel and that his decision was voluntary. Compare *Brewer* v. *Williams*, *supra* (holding that the defendant had not waived his Sixth Amendment right to counsel because he did not intentionally relinquish that right). The sole question in this case concerns the second part of the waiver test: whether petitioner was provided with the information he needed to make a "knowing" waiver of his right to counsel.

A. The *Miranda* Warnings Provide All The Information Needed To Make A Knowing Waiver of the Sixth Amendment Right To Counsel During Post-Indictment Interrogation

Before each of the post-indictment interrogations in this case, petitioner was informed that he had a right to the assistance of counsel in connection with the interrogation and that if he could not afford a lawyer one would be appointed for him. He also was told that he had a right to remain silent and that anything he said could be used against him. J.A. 39-40. That information was plainly sufficient to inform petitioner of the nature of his Sixth Amendment right. Indeed, the warning constituted a straightforward and accurate description of the constitutional right itself: petitioner was told that he had a right to the assistance of counsel at the interrogation, which is precisely what this

[3] *Moran* concerned a waiver of the rights conferred by this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), but the *Moran* Court did not indicate that its description of the waiver inquiry was limited to that context. Indeed, the Court relied upon *Johnson* and *Brewer*—two Sixth Amendment waiver cases—in formulating the waiver inquiry.

Court has held the Sixth Amendment provides in the context of post-indictment questioning by the police.

Petitioner also was aware of the consequences of waiving that right. The most direct consequence, of course, was that petitioner would not have the assistance of counsel during the interrogation. Although the interrogating officers did not say that in so many words, it was the obvious and unavoidable consequence of the decision to decline the assistance of a lawyer. Petitioner also was told that, if he declined to obtain the assistance of counsel and answered the questions posed by the police officer and the prosecutor, his statements could be used against him. Petitioner thus knew that by permitting the interrogation to proceed without the assistance of counsel, he ran the risk of creating evidence for the prosecution that could be introduced at his trial.

Since petitioner was informed of both the nature of his Sixth Amendment right and the consequences of his decision to abandon that right, he had all the information he needed to make a knowing waiver of the Sixth Amendment right. To paraphrase the Court's conclusion in a related context, "[i]t is inconceivable that such a warning would fail to alert [a defendant] to his right to" the assistance of counsel. *United States* v. *Washington*, 431 U.S. 181, 188 (1977).

This Court's decisions upholding waivers of the privilege against compelled self-incrimination under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), strongly support the conclusion that informing an individual of the nature of the right and the consequence of a waiver is all that is necessary to lay the foundation for a knowing waiver of that right. Cf. *Michigan* v. *Jackson*, 475 U.S. 625 (1986) (applying *Miranda* waiver concepts in Sixth Amendment context). The Court recently concluded that "[t]he *Miranda* warnings protect [the self-incrimination] privilege by ensuring that a suspect knows that he may choose not to

talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him." *Colorado* v. *Spring*, No. 85-1517 (Jan. 27, 1987), slip op. 9; see also *Moran* v. *Burbine*, 475 U.S. at 424.

All the information required for an effective waiver of the rights described in the *Miranda* warnings is conveyed by (1) a statement of the substance of the rights—that the suspect has the right to remain silent and the right to counsel before questioning, and (2) the warning that anything the suspect says may be used against him. For the same reasons, a statement of the substance of the analogous Sixth Amendment right to the assistance of counsel at interrogation, together with a warning regarding the consequences of being questioned without counsel, provides a sufficient foundation for a knowing waiver of that Sixth Amendment right. See *Brewer* v. *Williams*, 430 U.S. at 436 n.5 (White, J., joined by Blackmun and Rehnquist, JJ., dissenting) ("[t]here is absolutely no reason to require an additional question to the already cumbersome *Miranda* litany just because the majority finds another case—*Massiah* v. *United States*[, 377 U.S. 201 (1964)]—providing exactly the same right to counsel as that involved in *Miranda*. • • • If an intentional relinquishment of the right to counsel under *Miranda* is established by proof that the accused was informed of his right and then voluntarily answered questions in counsel's absence, then similar proof establishes an intentional relinquishment of the *Massiah* right to counsel").[4]

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[4] Many courts of appeals have reached the same conclusion. See *United States* v. *Brown*, 569 F.2d 236, 239 (5th Cir. 1978) (en banc); *United States* v. *Woods*, 613 F.2d 629, 634 (6th Cir.), cert. denied,

B. Nothing About the Sixth Amendment Right To Counsel At Interrogation Justifies A Waiver Procedure More Elaborate Than That Required By This Court's Decision in *Miranda*

Petitioner makes two related arguments in support of his position that the *Miranda* warnings are not sufficient to support a waiver of the Sixth Amendment right to counsel at a post-indictment interrogation. First, he asserts that the Sixth Amendment right to counsel is broader and more important than the right to counsel referred to in the *Miranda* warnings. For that reason, he contends, a waiver of the Sixth Amendment right cannot be found as readily as a waiver of the right to counsel at issue in *Miranda*. Second, petitioner argues that there are differences in the setting in which the two rights arise that justify the application of different waiver principles.[5]

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446 U.S. 920 (1980); *United States* v. *Binder*, 769 F.2d 595, 599 (9th Cir. 1985); see also *United States* v. *Payton*, 615 F.2d 922, 924-925 (1st Cir.), cert. denied, 446 U.S. 969 (1980) (*Miranda* warnings plus information that the defendant had been indicted); *Murphy* v. *Holland*, 776 F.2d 470, 481-482 (4th Cir. 1985) (reserving question); *Robinson* v. *Percy*, 738 F.2d 214, 222 (7th Cir. 1984) (case-by-case approach). Only the Second Circuit has taken a contrary view. See *United States* v. *Mohabir*, 624 F.2d 1140 (1980) (adopting stringent waiver requirement).

[5] Contrary to petitioner's apparent belief (Br. 9), no rule of constitutional law mandates the formulation of a different waiver requirement for every constitutional right. Constitutional guarantees may overlap, with the result that a particular right is protected by two separate provisions of the Constitution. See, e.g., *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981) (government interference with religious speech implicates Free Speech Clause as well as the Free Exercise Clause). Nothing renders the *Miranda* warnings inherently unsuitable as the means for supplying a suspect with the information necessary for an effective waiver of the Sixth Amendment right to the assistance of counsel at a post-indictment interrogation. The *Miranda* warnings are not by their terms limited to the Fifth Amendment context; the portion of the warnings relating to the assistance of counsel at interrogation refers simply to a "right to counsel."

1. The waiver test applicable to a particular right cannot be ascertained by ranking constitutional rights on some subjective scale of importance and asserting that the proof necessary to establish a valid waiver necessarily increases as one moves along that scale. Constitutional rights cannot be ranked as greater and lesser; they are simply different. Cf. *Prince* v. *Massachusetts*, 321 U.S. 158, 164 (1944). Nor has this Court in any way suggested that the proper content of the waiver standard depends on a judgment as to the "importance" of a particular right. For example, the Fourth Amendment right to security of the home or person is certainly an "important" right, but that right can be waived by consent to a search without any advice at all regarding the nature of the right being given up or the consequences of its waiver. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

Rather than depending on an assessment of the importance of the underlying right, the procedures necessary to obtain a "knowing" waiver turn on the interests protected by the underlying right and the relative ease or difficulty of comprehending both the right and the consequences of its surrender. When a defendant agrees to plead guilty, for example, he effectively waives a whole complex of rights. Because of the number of rights involved and the fact that it is not necessarily obvious that the consequence of a guilty plea is the forfeiture of those rights, the defendant must be aware of more than the mere fact that he has a right to enter a plea of not guilty. The defendant must be advised or otherwise be shown to understand each of the rights he is forfeiting by his guilty plea. See *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

As we have explained, the *Miranda* warnings satisfy this test in the context of pretrial interrogation. They fully inform a defendant of the substantive content of the Sixth Amendment right to the assistance of counsel during interrogation and the consequences of a decision to waive that right.

Petitioner attempts (Br. 25) to analogize the waivers at issue here to a decision to waive the assistance of counsel at trial. But the stark contrast in the complexity of the rights at issue explains the difference in the procedures for waiving counsel at trial and waiving counsel during pretrial interrogation. In *Faretta* v. *California*, 422 U.S. 806 (1975), this Court held that the Sixth Amendment guarantees a defendant the right to refuse the assistance of counsel and to choose instead to represent himself at trial. The Court stated that "the accused must 'knowingly and intelligently' forgo [the benefits of representation by counsel]. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open' " (422 U.S. at 835 (citations omitted)).

The right to the assistance of counsel at trial addressed in *Faretta* is the "core" right guaranteed by the Sixth Amendment (see *United States* v. *Gouveia*, 467 U.S. at 188-189). This case, on the other hand, concerns partial waivers of a less central component of the Sixth Amendment right to counsel: petitioner's waivers were limited to his right to the assistance of counsel at the post-indictment interrogations. Accordingly, a suspect in petitioner's position need only be informed of the nature of the limited right to counsel at interrogation and the consequences of waiving that limited right. There is no need to provide the suspect with information about the portion of the right that is *not* being waived.

The differences between the role of counsel at a pretrial interrogation and counsel's role at the trial itself justify different conclusions regarding the amount of information needed for a knowing waiver in these two contexts. The complex procedural and substantive rules governing

the conduct of a trial—and the complex determinations that must be made by an attorney—are likely to be quite unfamiliar to a defendant. For that reason, it may be necessary to provide a defendant contemplating self-representation at trial with a considerable amount of information concerning both the nature of the proceeding and the lawyer's role in representing his client in that proceeding. Cf. *United States* v. *Gouveia*, 467 U.S. at 188-189 (citation omitted) (accused is " 'confronted with both the intricacies of the law and the advocacy of the public prosecutor' " at trial); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932).

Unlike a trial, a pretrial interrogation is not governed by complex procedural or substantive rules. The basic issue confronting the suspect is whether to answer the questions or to exercise his privilege against self-incrimination. Counsel's role in that context is generally just to advise his client whether he should speak with the authorities or not, and to shield his client from possible overreaching by the police. Our legal system assumes that, armed with the information provided by the *Miranda* warnings, the suspect has the capacity to decide whether to seek the assistance of counsel for those purposes prior to the commencement of adversary proceedings. See, *e.g.*, *Colorado* v. *Spring*, slip op. 9. Nothing about the commencement of such proceedings undercuts that assumption. Accordingly, no additional information is required to acquaint the suspect with the nature of the right to counsel in the pretrial interrogation context.

2. The virtual identity between the substantive protection conferred by the right to the presence of counsel under *Miranda* and the Sixth Amendment right to the assistance of counsel at interrogation, as well as the similarity in the interests implicated in the two contexts, strongly support the conclusion that the same information should suffice to establish a knowing waiver of the two rights.

The Fifth Amendment privilege against compelled self-incrimination does not expressly encompass a right to the assistance of counsel. Rather, the privilege "is only that the witness not be *compelled* to give self-incriminating testimony. The test is whether, considering the totality of the circumstances, the free will of the witness was overborne" (*United States* v. *Washington*, 431 U.S. at 188 (emphasis in original)). In most contexts, the failure to assert the privilege constitutes an effective waiver; no prior warnings are required. *United States* v. *Mandujano*, 425 U.S. 564, 574-575 (1976) (plurality opinion). When an individual is subjected to custodial interrogation, however, this Court's decision in *Miranda* v. *Arizona*, *supra*, requires police officers to follow "procedural safeguards" designed to combat the pressures of custodial interrogation and "permit a full opportunity to exercise the privilege against self-incrimination." 384 U.S. at 444-445, 467; see also *Moran* v. *Burbine*, 475 U.S. at 420; *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974). Accordingly, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed" (*Miranda*, 384 U.S. at 444-445). The right to the presence of an attorney set forth in the warning is, of course, limited to the context of custodial interrogation.[6]

[6] That right is not triggered by the initiation of the interrogation. *Michigan* v. *Mosley*, 423 U.S. 96, 104 n.10 (1975); see also *Moran* v. *Burbine*, 475 U.S. at 433 n.4. However, any statement will be inadmissible at trial unless the suspect waives his right to counsel before giving the statement. See *Miranda* v. *Arizona*, 384 U.S. at 479. As applied to custodial interrogation, the right is therefore indistinguishable in effect from the Sixth Amendment right to counsel.

The Sixth Amendment right to counsel is, of course, grounded in the language of the Amendment itself.[7] The right to counsel "means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. [It] also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance. * * * [A]t the very least, the prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel" (*Maine* v. *Moulton*, 474 U.S. 159, 171 (1985)). Thus, in addition to providing a defendant with a right to the presence of counsel at particular proceedings, the Sixth Amendment bars the police from using investigative techniques that result in the circumvention of the right to counsel. See *Maine* v. *Moulton*, *supra* (electronic surveillance of the defendant's conversations with third parties); *United States* v. *Henry*, 447 U.S. 264 (1980) (use of cellmate to surreptitiously monitor the defendant's conversations); *Massiah* v. *United States*, *supra*.

There is no difference in the substantive content of these two guarantees as they apply to the situation presented in this case—a non-surreptitious post-indictment interrogation of a suspect in police custody, where the suspect has not asserted a right to counsel and the suspect's attorney has not attempted to communicate with him. Both *Miranda* and the Sixth Amendment grant the suspect a right to the presence of counsel at the interrogation; if that right is violated, the suspect's statements may not be admitted at trial. In view of the complete congruence between the two rights, the same information

[7] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to * * * have the Assistance of Counsel for his defence."

should suffice to establish a knowing waiver of both rights.[8]

Nor should the procedures leading to a waiver under *Miranda* or the Sixth Amendment differ because of a difference in the balance of interests between the government and the suspect under the Fifth and Sixth Amendments. The Court has described the decision in *Miranda* as striking a balance between "society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights" (*Moran* v. *Burbine*, 475 U.S. at 424). On one side of the balance, the Court has recognized that custodial interrogation brings significant pressures to bear on an individual to give up his right to remain silent. In light of those pressures, the Court established a right to counsel under *Miranda* in order to "assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process" (*Miranda*, 384 U.S. at 469). The Court noted that the

[8] There would be a difference in both analysis and result under the two constitutional standards if the facts in a particular case implicated the aspect of the Sixth Amendment guarantee that bars government circumvention of the attorney-client relationship. For example, a suspect may effectively waive his *Miranda* rights even if the police fail to tell him that his attorney has tried to reach him; a Sixth Amendment waiver, however, would not be valid unless the police provided the suspect with that information. See *Moran* v. *Burbine*, 475 U.S. at 424, 428.

Similarly, conversations initiated by undercover police officers do not implicate the protections of *Miranda* because they do not subject the suspect to custodial interrogation. But *Massiah* and its progeny make clear that such activities do violate the Sixth Amendment, because the defendant has a right to the assistance of counsel at such confrontations with the authorities and, by virtue of the surreptitious nature of the activity, the defendant could not be found to have waived that right. See *United States* v. *Henry*, 447 U.S. at 273.

presence of an attorney would reduce the likelihood that the police would engage in coercion and "help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution." *Id.* at 470; see also *Fare* v. *Michael C.*, 442 U.S. 707, 719 (1979). Moreover, the Court observed that the warnings and the right to the presence of counsel grounded in the privilege against compelled self-incrimination serves to protect a defendant's rights at trial: "[w]ithout the protections flowing from adequate warnings and the rights of counsel, 'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police' " (*Miranda*, 384 U.S. at 466 (citations omitted)).

On the other side of the balance, the Court has recognized that " 'the need for police questioning as a tool for effective enforcement of criminal laws' cannot be doubted. Admissions of guilt are more than merely 'desirable'; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. at 426 (citations omitted); see also *Schneckloth* v. *Bustamonte*, 412 U.S. at 225; *Haynes* v. *Washington*, 373 U.S. 503, 515 (1963); *Culombe* v. *Connecticut*, 367 U.S. 568, 571, 576, 578-580 (1961) (opinion of Frankfurter, J.). For that reason, the Court has refused to prohibit custodial interrogation, and it has permitted interrogation following a waiver of the right to have counsel present during questioning, upon a showing that the suspect was informed of the right and voluntarily relinquished it. See *Miranda*, 384 U.S. at 475-476, 479.

The waiver of the Sixth Amendment right to the assistance of counsel at interrogation implicates similar competing interests and therefore does not require a different waiver procedure. On the government's side of the

balance, the interest is the same: the government's interest in obtaining evidence of crime does not abate upon the commencement of adversary proceedings against an individual; it continues through the preparation for trial.[9]

On the individual's side of the balance, the interests protected by the Sixth Amendment counsel guarantee in the context of police interrogations are virtually identical to the interests protected by *Miranda*. Indeed, the Court has described the purposes of the right in terms identical to those used in *Miranda*, stating that "[i]n *Massiah* counsel could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution." *United States* v. *Ash*, 413 U.S. at 312 (citing both *Massiah* and *Miranda*). Furthermore, like *Miranda*, the Sixth Amendment right to counsel is intended to prevent pretrial encounters between a defendant and the police from effectively nullifying the protections afforded to the accused at trial. See *Maine* v. *Moulton*, 474 U.S. at 170; see also *Schneckloth* v. *Bustamonte*, 412 U.S. at 239-240. Since the interests of the individual protected by the two rights are the same, it is

[9] One court of appeals has suggested that the government's interest in obtaining such evidence is reduced because "any questioning of the defendant by the government can only be 'for the purpose of buttressing • • • a prima facie case' " (*United States* v. *Mohabir*, 624 F.2d 1140, 1148 (2d Cir. 1980) (citation omitted)). This suggestion rests upon an unrealistic view of the criminal justice process. While in some instances the government's case is complete at the time of indictment, there are many instances in which charges must be brought after probable cause is established but before the investigation is complete. Even when the prosecution believes that it has sufficient evidence to warrant a conviction, the vagaries of the jury system are such that the prospect of a conviction does not approach certainty until the government's evidence crosses the line between a strong case and an overwhelming one. For that reason, the investigative process often continues after the commencement of adversary proceedings as the prosecution seeks to present the strongest possible case at trial.

logical to conclude that knowledge of the same set of facts permits a suspect to waive both of the rights.

In seeking to distinguish pre-indictment and post-indictment interrogation, petitioner points out (Br. 16-18 (citation omitted)) that after the filing of an indictment, the " 'adverse positions of government and defendant have solidified,' " and the defendant is " 'faced with the prosecutorial forces of organized society.' " From that, he contends that the imposition of a more stringent waiver standard is appropriate in such a setting. But the considerations cited by petitioner merely explain why the the Sixth Amendment right attaches at the time of indictment. It is those factors that justify the imposition of some warning requirement rather than no warning at all; those factors do not provide any justification for a heightened warning requirement, especially in light of the similar purposes served by the *Miranda* and Sixth Amendment guarantees in this context.

In any event, with respect to the relative positions of the individual and the interrogator, it is unclear what, if anything, turns on the "solidified" positions of the government and the defendant. An interrogator, whether before indictment or afterwards, has a single interest – to obtain information. The defendant may have a variety of interests ranging from persuading the interrogator of his innocence, improving his position through apparent or actual cooperation, helping (or perhaps hurting) his cohorts, or simply experiencing the relief of confession. Most, if not all, of those interests are the same whether the interrogation occurs before or after indictment.[10]

[10] This point can be illustrated by a situation that arises with some frequency – where the police seek to question an individual about several crimes, some of which have been made the subjects of formal charges and some of which are still in the investigative stage. The respective interests of the individual and the police do not change when the subject of the questioning changes from a crime on which

Petitioner also suggests (Br. 19-20) that the Sixth Amendment waiver standard should differ from the *Miranda* test because a suspect's interest in cooperating with the police is reduced after indictment. That difference, however, does not suggest that there should be a difference in the waiver procedure. The nature of the right to counsel and the unfavorable consequences of waiver remain the same before and after indictment. The fact that after indictment it may be more likely that the consequences will turn out to be unfavorable goes to the wisdom of the waiver decision, not to whether it was knowingly made. Put another way, the fact that the decision to make a statement may not be in the suspect's self-interest is not relevant to the waiver decision, because the purpose of the Sixth Amendment right is to secure to the defendant the right to representation, not to encourage him not to speak with the police. In any event, there are in fact advantages to be gained from cooperation with the police even after indictment. For example, the cooperating suspect may win the right to plead guilty to a lesser charge as the result of a decision to cooperate with the police, or he may even be able to persuade the authorities that they have indicted the wrong person.

3. Although petitioner repeatedly asserts (Br. 26-30) that the prosecution should bear a greater burden when it seeks to establish a waiver of Sixth Amendment rights, he fails to specify the contours of the additional burden that he proposes. Petitioner's inability to define the way in which he would supplement the *Miranda* waiver procedures serves only to emphasize the fact that petitioner is unable to find an interest underlying the Sixth Amend-

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the individual has been charged to a crime on which charges have not yet been brought.

ment right to the assistance of counsel at interrogation that is not fully protected by the *Miranda* warnings.

Petitioner suggests at one point (Br. 30-31 n.1) that "police and prosecutors might alert the indicted accused to the nature of the Sixth Amendment right being waived" through additional warnings.[11] But, as we have shown, additional warnings are not necessary to inform a defendant of the nature and consequences of a waiver decision. The purpose of such warnings presumably would be to provide a defendant with "information to help him calibrate his self-interest in deciding whether to speak or stand by his rights" (*Moran* v. *Burbine*, 475 U.S. at 422). But nothing in the Sixth Amendment requires the government to provide a suspect with such information. And any incremental protection of the Sixth Amendment privilege

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[11] One possible addition to the *Miranda* warnings would be to advise the defendant in the post-indictment setting that he has been indicted. That information was conveyed in this case, for petitioner was advised that he had been indicted for murder. Tr. 21. The court below relied upon that fact in upholding the validity of the waivers, stating that the information regarding the indictment made petitioner "aware of the gravity of his legal situation" (J.A. 30). Because petitioner was supplied with that information, this case does not present the question whether police officers must inform a suspect of the fact that formal adversary proceedings have commenced and specify the charges lodged against the suspect in order to obtain a valid waiver of the Sixth Amendment right to the assistance of counsel at interrogation.

As a general matter, a defendant involved in post-indictment interrogation is usually well aware that he has been indicted; the question whether such a warning is constitutionally required accordingly is not likely to arise with any frequency. In any event, we doubt that the Sixth Amendment embodies a special rule requiring that a suspect be informed of "the gravity of his legal situation" in order to make an effective waiver of rights; and any additional warning requirement may lead to uncertainty as to the scope of the requirement and may deter the gathering of probative evidence. See *United States* v. *Mohabir*, 624 F.2d at 1150 (holding that informing the defendant of the fact that he was indicted is not sufficient to validate a Sixth Amendment waiver; prosecutor also must explain "the significance of the indictment").

"would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt," because the premise of the additional warnings is that they would convince a suspect to assert his right to counsel. *Moran* v. *Burbine*, 475 U.S. at 427.

Finally, any additional warning requirement would lead to considerable uncertainty. The Court repeatedly has cited the benefits of the bright-line character of the *Miranda* rules, and it recently relied upon those benefits in applying one of those rules in the Sixth Amendment context (see *Michigan* v. *Jackson*, 475 U.S. at 634-635). Holding that the *Miranda* warnings provide a suspect with the foundation necessary for a knowing waiver of the Sixth Amendment right to the assistance of counsel at interrogation would have the advantage of avoiding confusion regarding the obligations of law enforcement officers seeking to obtain probative evidence.[12]

Petitioner argues (Br. 30-31) that the attachment of Sixth Amendment rights should be deemed the equivalent of an invocation of the right to counsel under *Miranda*. Under his theory, once the suspect's Sixth Amendment rights have attached, a police officer would be barred from approaching the suspect to attempt to obtain in-

[12] Petitioner also suggests (Br. 30-31 n.1) that consultation with counsel should be a prerequisite to an effective waiver or that a defendant should be prohibited from waiving his Sixth Amendment right. But such rules would squarely conflict with *Faretta*, which preserves the individual's rights to decide for himself whether to seek the assistance of counsel. One court of appeals has exercised its supervisory power to adopt the rule that an effective waiver of the Sixth Amendment right to counsel may be obtained only if the warnings are administered by a neutral judicial officer. See *United States* v. *Mohabir*, 624 F.2d at 1153. As the court of appeals itself apparently recognized, nothing in the Sixth Amendment supports the conclusion that rights associated with pretrial proceedings may be waived only in a trial-type setting. We submit that law enforcement officers are competent to supply suspects with the necessary information.

formation. Petitioner's theory, however, is inconsistent with this Court's analysis in *Michigan* v. *Jackson*, *supra*. The question in *Jackson* was whether the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), applies with respect to the Sixth Amendment right to counsel. *Edwards* holds that a suspect in custody who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police" (451 U.S. at 484-485). The Court held in *Jackson* that the *Edwards* rule applies to waivers of the Sixth Amendment right to the assistance of counsel at interrogation: "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid" (475 U.S. at 636).

If petitioner were correct that the attachment of the Sixth Amendment right to counsel automatically triggers the *Edwards* rule, there would have been no need for this Court to base its decision in *Jackson* upon the defendant's request for counsel at his arraignment: the subsequent waiver would have been invalid even if the defendant had not previously requested counsel. Yet nothing in the Court's decision indicates that the request for counsel was irrelevant or that the police officers may never approach a defendant after indictment. See *Michigan* v. *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting) (emphasis in original) ("the Court most assuredly does *not* hold that the *Edwards per se* rule prohibiting all police-initiated interrogations applies from the moment the defendant's Sixth Amendment right to counsel attaches, with or without a request for counsel by the defendant. * * * Applying the *Edwards* rule to situations in which a defendant has not made an explicit request for counsel would * * * render

completely nugatory the extensive discussion of 'waiver' in such prior Sixth Amendment cases as *Brewer* v. *Williams*, 430 U.S. 387, 401-406 (1977)").

In any event, the automatic prohibition upon police questioning that would be effected by petitioner's proposed rule would represent a "shockingly dramatic restructuring of the balance this Court has traditionally struck between the rights of the defendant and those of the larger society" (*Michigan* v. *Jackson*, 475 U.S. at 640 (Rehnquist, J., dissenting)). In some cases, such as where a suspect is not apprehended until after indictment, police officers may have no opportunity to question the suspect until after his Sixth Amendment rights have attached. Petitioner's rule would completely foreclose law enforcement officers from making even a single attempt to obtain the suspect's cooperation, thus placing off limits what might be the single most valuable source of evidence available. Nothing in the Sixth Amendment or practical experience suggests that such an extreme measure is needed to protect defendants against the risk that they may improvidently waive their right to counsel.[11]

[11] Even if petitioner's legal theory were correct, moreover, it would not alter the result with respect to the admissibility of petitioner's statements. Although Officer Gresham told petitioner that he had been indicted, petitioner plainly initiated the conversation that culminated in the interrogation. See page 3, *supra*. In that circumstance, *Jackson* would not invalidate petitioner's subsequent waivers of his Sixth Amendment right.

CONCLUSION

The judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted.

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AMICUS CURIAE

BRIEF

No. 86-7059

In The
Supreme Court of the United States
October Term, 1987

TYRONE PATTERSON,
Petitioner,

v.

STATE OF ILLINOIS,
Respondent.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, THE NATIONAL SHERIFFS' ASSOCIATION, AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, IN SUPPORT OF THE RESPONDENT.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Donald S. Honchell, Assistant Public Defender, Cook County, Illinois, Counsel for the Petitioner, and Hon. Jack

Donatelli, Assistant Attorney General, State of Illinois, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* eighty times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 67 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the

benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

The Illinois Association of Chiefs of Police, represents law enforcement executives and administrators in the State of Illinois. It actively engages in training programs and publications for Illinois law enforcement officers, as well as *amicus curiae* advocacy in cases critical to law enforcement interests in the State.

Amici are national and state associations, and their perspective is broad. This brief concentrates on policy issues concerning the giving of warnings to persons subject to law enforcement interrogation, and the need to give law enforcement agencies clear guidance with respect thereto. Although Respondent is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these. We speak on behalf of law enforcement officers and law enforcement administrators nationally, including, of course, the State of Illinois.

ARGUMENT

THE WARNINGS OF *MIRANDA V. ARIZONA* ARE SUFFICIENT TO ASSURE THAT AN INDICTED DEFENDANT HAS KNOWINGLY AND INTELLIGENTLY WAIVED, AT INTERROGATION FOLLOWING AN INDICTMENT, HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL.

In this case the Supreme Court of Illinois ruled that the Petitioner (hereinafter referred to as "defendant") knowingly and intelligently waived his Sixth Amendment right to counsel before making postindictment statements to the police and an assistant Illinois State's Attorney, where the defendant was informed of the fact that he had been indicted for murder before he gave statements and was aware of the gravity of his situation and, before he gave the statements, was advised of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). *People v. Patterson*, 116 Ill. 2d 290, 507 N.E.2d 843 (1987).

Amici will not duplicate the case law analysis presented by the Respondent in this case, although we do agree with it. Instead, we concentrate upon issues of policy that concern our law enforcement constituency.

Waivers constitute a significant and legitimate role in our criminal justice system, and their range is considerable.

The ultimate waiver is the one that is available to a convicted murderer under sentence of death. If he decides, because of remorse, or an awareness of what life is like behind prison walls, or for any other reason, to refuse the full panoply of appellate review available to him, the Constitution affords him that right -- despite the pleas of family and friends and the availability of the

gratuitous services of groups of lawyers and others philosophically opposed to capital punishment. Moreover, before the convicted person is led to the electric chair or to the place where he is to receive the lethal injection of a drug, there is no requirement that he be advised of the amount of electric voltage or the particular kind of drug to be administered. All that is required for waiver of the final legal remedies available to him is the mental capacity to understand the nature and consequence of his selected option. Among the recent instances of the acceptance of the death penalty option is the case of Gary Gilmore. *Gilmore v. Utah*, 429 U.S. 1012 (1976).

A valid waiver may be made of the continued assistance of counsel during trial, even though this is a highly critical stage in the criminal justice process. Within the awesome surroundings of the courtroom there are legal rules and procedures that are beyond the understanding and utilization by persons untrained in the law. A failure to recognize or effectively apply the protective procedures for the refutation of the prosecution's evidence or witness testimony could very well result in the conviction of an innocent person, or in the imposition of an unduly harsh penalty upon a guilty one. Nevertheless, upon a proper showing of competency to make the pro se choice, the accused person's decision to proceed without counsel must be respected. *Faretta v. California*, 422 U.S. 804 (1975); *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

Even when a defendant on trial is represented by counsel, he is permitted to insist upon testifying on his own behalf, despite the admonition of counsel to exercise his right to silence. A.B.A. Defense Function Standards, Sec. 4-7.7, prescribes the procedures to be followed in such instances.

There are a number of jurisdictions (New York being the exception) that have accorded suspects the right to revoke, prior to trial, the continued assistance of retained or appointed counsel, even without counsel's knowledge or approval. *Shreeves v. United States,* 395 A.2d 774 (D.C. App. 1978); *United States v. Brown,* 569 F.2d 236 (5th Cir. 1978); *State v. Norgaard,* 653 P.2d 483 (Mont. 1982) (in which the court expressly rejected the New York rule); *State v. Jackson,* 205 Neb. 806, 290 N.W.2d 458 (1980). With regard to the New York rule, note should be made of the fact that even in that state, a counseled suspect held for one crime is privileged to make a waiver of counsel as regards an unrelated charge for which he does not have a lawyer. *People v. Kazmarick,* 52 N.Y.2d 322, 420 N.E.2d 45 (1981), and *People v. Rosa,* 65 N.Y.2d 380, 482 N.Y.S.2d 21 (1985).

A criminal justice system that permits waivers in the foregoing types of situations should encounter no difficulty in permitting waivers of counsel during the police interrogation process. Indeed, in *Miranda v. Arizona,* 384 U.S. 436 (1966), this Court specifically allowed for waivers of a custodial suspect's right to silence and to counsel. Waivers are also permitted with respect to the Fourth Amendment's protection against unreasonable searches and seizures. Moreover, this Court has held that consensual searches need not be preceded by any warnings regarding the Fourth Amendment's protection. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1976). This Court has also ruled that the same principle is applicable to consensual suspects who are already in custody. *United States v. Watson,* 423 U.S. 411 (1976).

In the instant case defendant argues, essentially, that once a person has been indicted there can be no waiver of counsel, or, alternatively, the *Miranda* warnings are considered inadequate with respect to the Sixth

Amendment's right to counsel. To him the right to counsel has a higher priority than the right to silence, insofar as the interrogation process is concerned. It is of interest to note that one of the strongest supporters of *Miranda,* Professor Yale Kamisar, is of the view that the rationale for the attribution of a higher value of the right to counsel than the right to silence is "baffling" in that, as he correctly points out, the basic concern of the Court in *Miranda* was the protection of the self-incrimination privilege, with only a secondary or auxiliary consideration accorded the right to counsel. See, 34 Cr.L. 2101 (1983), a comment made during a Symposium on Supreme Court Review and Constitutional Law.

We submit that if waivers are tolerated at the trial and pre-trial process, as has been illustrated in the early portion of our brief, there is no impediment to a waiver merely because of an indictment. Furthermore, the *Miranda* warnings do not imply that the right to counsel is confined to the interrogation room setting. They refer to counsel in an unrestricted context. It is in no way comparable to a flawed *Miranda* warning respecting "counsel at trial," which, of course, would mislead the custodial suspect as regards the right to counsel at the time of interrogation. Moreover, in the instant case the defendant already knew that he was under indictment.

In addition to the waivers (actually two of them) that were signed by defendant, we wish to note that even if he had claimed his right to counsel, it was he who initiated the conference with the police by his inquiry as to whether one of the other participants in the crime had been indicted, adding that he had been involved in a fight with the victim shortly before his actual murder. *Oregon v. Bradshaw,* 462 U.S. 1039 (1983).

Defendant has made references to the need of

accused persons for "the guiding hand of counsel." Most certainly there is that need at the time an accused person makes his appearance in court, whether it be on an indictment or other formal charge. It does not follow, however, that prior to the courtroom appearance an accused person must submit, figuratively speaking, to have an attorney place his hand over the mouth of the accused to keep him from talking if he wishes to do so.

CONCLUSION

Amici submit that the judgment of the court below should be affirmed on the basis of the law and sound judicial policy.

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AMICUS CURIAE

BRIEF

No. 86-7059

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

TYRONE PATTERSON,
Petitioner,

v.

ILLINOIS,
Respondent.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF AMICUS CURIAE THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a non-profit, public interest law center based in Washington, D.C., with 120,000 members nationwide. WLF has participated in and devotes a substantial portion of its resources to cases involving the criminal justice system. One of WLF's primary goals is to ensure that an appropriate balance is maintained between the rights of criminal defendants and those of the law-abiding public. To this end, WLF has appeared as *amicus curiae* in numerous criminal cases before this Court as well as other

federal and state courts. *See, e.g., McCleskey v. Kemp,* 107 S.Ct. 1756 (1987), *California v. Ciraolo,* 106 S.Ct. 1809 (1986), and *Illinois v. Gates,* 462 U.S. 213 (1983).

WLF is especially concerned over attempts to restrict legitimate and necessary law enforcement activity by the technique of creating new constitutional "rights" for criminal defendants. The instant case presents just such an attempt, the new "right" being a practically unwaivable right to counsel in the context of post-indictment questioning. WLF urges this Court to reject this unwarranted obstacle to the obtaining of otherwise voluntary confessions.

WLF appears as *amicus curiae* with the written consent of both petitioner and respondent.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts by reference the statement of the case set forth by respondent.

SUMMARY OF ARGUMENT

This case presents the following issue: Where an indicted defendant makes an admittedly valid waiver of his right to counsel with respect to the Fifth Amendment privilege against compulsory self-incrimination, does the Sixth Amendment nevertheless allow him to complain that his subsequent statements stemmed from a violation of his right to counsel? *Amicus* contends that it most assuredly does not.

In arguing that the *Miranda* warnings are an insufficient basis for waiving the Sixth Amendment right to counsel, petitioner ignores the fact that, regardless of the post-indictment context of this case, the only right implicating the assistance of counsel on the facts presented here is the right against compulsory self-incrimination—the very right that the *Miranda* warnings were designed to protect. Nothing petitioner says—not his lengthy comments on the significance of counsel at pre-trial "critical

stages" nor his argument that the Sixth Amendment establishes a "higher" right to counsel than the Fifth Amendment—can obscure this crucial fact.

Every attorney function that petitioner identifies as important in the context of post-indictment questioning is equally important in the pre-indictment context. Furthermore, petitioner's confession would have been no less damaging to his case had he made it before instead of after indictment. Thus, petitioner never satisfactorily explains why the very warnings that the *Miranda* Court deemed adequate to waive the right to counsel *before* indictment should, on the facts of this case, be deemed inadequate to waive what is in effect the identical right *after* indictment.

The real basis for petitioner's objection to the warnings given here has nothing to do with logic or the precedents of this Court. His argument, quite simply, reflects a fundamental opposition to the use of confessions as evidence, period. He would have this Court require that defendants be not merely advised of their rights, but induced to assert them, *i.e.*, given whatever information is necessary to dissuade them from making the admissions of guilt that, as this Court has recognized, society has a legitimate and substantial interest in obtaining.

Petitioner's arguments—both tacit and explicit—must be rejected by this Court if the criminal justice system is to maintain a workable and appropriate balance between the interests of criminal defendants and those of society as a whole.

ARGUMENT

The issue in this case is, in essence, whether state conduct that is admittedly sufficient to protect a defendant's rights under one constitutional amendment should be held to violate, simultaneously, what amounts to the identical right under another amendment. Specifically, the instant case presents this Court with the opportunity to resolve a dispute among the Circuit Courts of Appeal about the relationship between waivers of the right to counsel for Fifth and Sixth Amendment purposes.[1] As this Court has recognized, this is a subject that has received "considerable attention in the courts . . . and the commentaries"; until today, however, this Court has not had occasion to address the matter in detail. *Michigan v. Jackson*, 475 U.S. 625, —— n. 10, 106 S.Ct. 1404, 1411 n. 10 (1986). *See also Moran v. Burbine*, 475 U.S. 412, ——, 106 S.Ct. 1135, 1145 n. 2 (1986) (argument that valid waiver of Fifth Amendment right to counsel served to waive parallel rights under Sixth Amendment not raised, so "no occasion to consider whether a waiver for one purpose necessarily operates as a general waiver of the right to counsel for all purposes"); *Brewer v. Williams*, 430 U.S. 387, 405-406, 97 S.Ct. 1232, 1243 (1977) (Court explicitly declined to hold "that Williams *could not*, without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments") (emphasis in original).

For the reasons discussed below, a finding for petitioner in this case would not simply violate one of the most elemental canons of construction—namely, the rule that the parts of a whole (here, the Constitution) are to be read in harmony with each other—it would radically alter the balance that this Court has taken such pains

[1] *See Murphy v. Holland*, 776 F.2d 470, 481 (4th Cir. 1985), comparing cases holding *Miranda* warnings sufficient for waiver of Sixth Amendment right to counsel with the Second Circuit's contrary minority view.

to maintain between the rights of defendants and those of the larger society.

I. THE *MIRANDA* WARNINGS ADEQUATELY ADVISED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL WITH RESPECT TO HIS POST-INDICTMENT STATEMENTS.

The salient fact of this case is that petitioner was informed of his right to counsel and chose to waive that right not once, not even twice, but three separate times.[2] The first occasion was when he was arrested for his participation in a gang fight. He received his *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)] rights, waived them, and gave a statement about the fight; however, when he was questioned by Officer Michael Gresham about the killing of James Kevin Jackson, the victim in this case, petitioner indicated he knew nothing about it. *People v. Patterson*, 116 Ill.2d 290, ——, 507 N.E.2d 843, 844 (1987).

The second time petitioner was informed of his right to counsel was two days later, when Officer Gresham removed him from the lockup to process and transfer him to the local jail. When Gresham told him that he had been indicted for murder, petitioner asked how many people had been indicted, whereupon Gresham gave him the names of two others. Patterson then began implicating another individual, at which point Gresham stopped him, gave him a *Miranda* waiver form, and read the warnings to petitioner as the latter read along with him. Petitioner initialed each warning—including the warning about his right to counsel—and signed the waiver. He then described how the victim was attacked and pulled from his car, how he (petitioner) struck the victim several times with his fist and with the victim's

[2] This fact alone belies petitioner's attempt to portray himself as the victim of a "scheme" to have him waive an "unknown right." *See* petitioner's brief (hereinafter "Brief") at 8-9.

shoe, and how his accomplices then drove the victim to a dead end, beat him about the head and face with clay boulders, and threw him into a mud puddle. This was the first of the two statements petitioner now claims were taken in violation of his right to counsel. *Id.* at 845.

The third time petitioner was told of his right to counsel was later that same day, by Assistant State's Attorney George Smith. Petitioner confirmed to Smith that he had signed and initialed the *Miranda* waiver form with Gresham and that he understood his rights. Nevertheless, Smith again told him of his rights, including his right to counsel. Additionally, Smith told petitioner that he, Smith, was assisting the police in the investigation of a murder and that he was not representing petitioner. In response, petitioner indicated he understood, said he had been treated well by the police, that he had been fed and rested, and that he was making his statement of his own free will and without having been threatened or promised anything. He then essentially repeated what he had told Officer Gresham and gave a detailed account of the murder. This was the second statement that petitioner now claims was taken in violation of his right to counsel. *Id.*

The facts are clear enough, though it is difficult to keep them from becoming obscured by the murky and abstract constitutional "analysis" that would force them to yield a violation of the right to counsel in the face of repeated, explicit waivers of that right.

A. The Function Of An Attorney And The Effect Of Waiving His Assistance Are The Same In Both The Fifth And Sixth Amendment Contexts With Respect To Confessions.

Petitioner claims that the *Miranda* warnings, which derive from the right to counsel that protects the Fifth Amendment privilege against compulsory self-incrimination, are insufficient to establish a valid waiver of the Sixth Amendment right to counsel. The standard for a valid waiver of the right to counsel is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1983). Petitioner's theory is that this Court has applied the *Zerbst* standard more strictly in the Sixth Amendment context than in the Fifth Amendment context. However, assuming *arguendo* that this theory is correct,[3] the *Miranda* warnings were—on the facts of this case—plainly sufficient to establish a valid waiver of the Sixth Amendment right to counsel regardless of how strictly the *Zerbst* standard is applied.

It must be noted at the outset that this is not a case where the state, on the basis of *Miranda* warnings alone, seeks to treat a defendant's decision to forgo the assistance of counsel in choosing whether or not to give a statement as a decision to forgo that assistance for some purpose not specified in the *Miranda* warnings, *e.g.*, participation in a post-indictment lineup. Rather, this is a case in which only one right in only one context is at issue, namely, the right to the assistance of counsel with respect to the making of pre-trial statements. It is true that this right is grounded in more than one constitu-

[3] Actually, the correctness of this theory is very questionable: the cases clearly demonstrate consistency in the application of the *Zerbst* standard in both contexts. *See Brewer v. Williams, supra*, 430 U.S. at 404, 97 S.Ct. at 1242 (Sixth Amendment) and *Edwards v. Arizona*, 451 U.S. 477, 482-483, 101 S.Ct. 1880, 1884 (1981) (Fifth Amendment). This consistency is altogether appropriate, given this Court's recognition that the *Zerbst* standard is a "high" one under *any* circumstances. *See Miranda v. Arizona, supra*, 384 U.S. at 475, 86 S.Ct. at 1628.

In any event, as will be shown *infra*, petitioner never satisfactorily explains how the very warnings crafted by the *Miranda* Court to comply with the *Zerbst* standard for waiving the right to counsel with respect to making statements would allow that same right to be—in petitioner's words—"unwittingly" waived, "too easily cast away," "easily surrendered," "inadvertently" or "lightly lost" in the instant case (Brief at 8-9, 24).

tional provision, *i.e.*, in the Fifth Amendment's privilege against compulsory self-incrimination as well as in the Sixth Amendment's right to mount a legal defense. It is also true that in the Fifth Amendment context, a defendant must actually request counsel for the right to counsel to attach (*Moran v. Burbine*, *supra*, 475 U.S. at 412, n. 1, 106 S.Ct. at 1142, n. 1), while in the Sixth Amendment context, the right to counsel attaches automatically when adversary proceedings are begun. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199 (1964); *Brewer v. Williams*, *supra*, 430 U.S. at 404, 97 S.Ct. at 1242; *Michigan v. Jackson*, *supra*, 475 U.S. at 625, 106 S.Ct. at 1409. However, these differences are ultimately irrelevant to the issue here, inasmuch as an attorney's function would be exactly the same under *both* Amendments: namely, to advise a defendant, *if the latter wants to be advised*, on whether or not to make a statement that he has in any event been told could be used against him in court. Indeed, not only would the attorney's *function* be the same; the *effect* of waiving the right to his assistance would also be the same, *i.e.*, the disclosure of possibly incriminating information. Given this identity of attorney-function and waiver-effect with respect to the making of statements, there is simply no logical reason to deem the *Miranda* warnings sufficient basis for waiving the right to counsel under the Fifth Amendment but not under the Sixth Amendment. No constitutionally significant purpose will be served by making it more difficult under one Amendment than the other for a defendant to exercise his right to speak without having to take direction from a lawyer.[4]

[4] Petitioner's argument that fuller warnings should be required before post-indictment questioning "because such events are as critical to the outcome of the case as the trial itself" (Brief at 28) proves too much. Surely, his confession was no more "critical" to the outcome of this case simply because he gave it *after* indictment instead of before. If he had confessed at the time of his arrest (when he received and waived his *Miranda* rights for the first time), that pre-indictment confession would have been admitted against him at trial just as his post-indictment confession was, and the jury's verdict would have been the same.

Thus, the short answer to petitioner's extended discussion of the significance of counsel during post-indictment questioning is that he was told three times that he could have an attorney—indeed, at no expense to him—if he wished. That being the case, it is sufficient to note that every attorney function petitioner identifies as important in the context of post-indictment questioning is equally important in the pre-indictment context. *Compare* petitioner's statement that, at post-indictment questioning, counsel serves as " 'spokesman for, or advisor to, the accused' " (Brief at 18) and as " 'a "medium" between him and the State' " (Brief at 19) *with* this Court's recognition in *Miranda v. Arizona*, *supra*, 384 U.S. at 469-470, 480, 86 S.Ct. at 1625-1626, 1631, that before or during custodial interrogation, counsel serves as a consultant to the accused, might advise the accused "not to talk to police until he has had an opportunity to investigate the case," can help "mitigate the dangers of untrustworthiness" if the accused does talk, reduce "the likelihood that the police will practice coercion" (or be in a position to testify to same in court), "guarantee that the accused gives a fully accurate statement to the police," and ensure that any statement given by the accused "is rightly reported by the prosecutor at trial." In light of the above, it is difficult to understand how petitioner can in effect contend that this Court should tolerate the "inadvertent" or "easy surrender" of the right to counsel on the basis of *Miranda* warnings in the pre-indictment context but be outraged by it in the post-indictment context.

In this regard, petitioner fails utterly in his attempt to prove that the Sixth Amendment establishes "a higher, permanent right to counsel" that cannot validly be waived

on the basis of the *Miranda* warnings associated with the "judicially created," "limited and narrow" Fifth Amendment right to counsel (Brief at 10, 22). Inasmuch as the *Miranda* Court itself ruled that "the right to have counsel present [during custodial] interrogation is *indispensable* to the protection of the Fifth Amendment privilege" (*Miranda v. Arizona*, *supra*, 384 U.S. at 469, 86 S.Ct. at 1625) (emphasis supplied), petitioner is in effect claiming that the Sixth Amendment right to counsel is a more significant and fundamental right than the Fifth Amendment privilege against compulsory self-incrimination. There is simply no conceivable justification for such an argument.[5]

Nor can petitioner's facile devaluation of the *Miranda* warnings in the post-indictment context be justified as a logical, reasonable, and appropriate extension of this Court's holding in *Michigan v. Jackson*, *supra*, that once a defendant has invoked his Sixth Amendment right to counsel, any waiver of that right in response to police-initiated questioning is invalid. Of crucial significance in that case is a fact conspicuously absent from this one, namely, the "defendant's *assertion*, at an arraignment or similar proceeding, of his right to counsel." *Id.*, 475 U.S. at ——, 106 S.Ct. at 1411 (emphasis supplied). *See also Maine v. Moulton*, 474 U.S. 159, ——, 106 S.Ct. 477, 479 (1985) (Sixth Amendment requires state to respect accused's decision to seek legal assistance "[o]nce the right to counsel has attached *and been asserted*")

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[5] Equally meritless is petitioner's attempt to minimize the significance of the Fifth Amendment right to counsel on the grounds that the Constitution "contains absolutely no reference" to it (Brief at 22). On this theory, petitioner should not even be before this Court, since the relief he seeks is an expansion of the "judicially created" right to counsel at pre-trial "critical stages"—a right that is nowhere to be found in the text of the Sixth Amendment.

(emphasis added).[6] Although in *Jackson* this Court noted that it was not suggesting that the Sixth Amendment right to counsel "turns on such a request," it did construe the request "as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation." *Id.*, 475 U.S. at ——, n. 6, 106 S.Ct. at 1409, n. 6.[7]

Thus, in the instant case, petitioner's failure to request counsel despite being advised of his right to do so on three separate occasions—twice by a police officer who also told him of his indictment for murder,[8] and once by an assistant state's attorney who also told him that he was investigating the murder and not representing petitioner—is itself the strongest and most unequivocal proof of the validity of his waiver under the *Zerbst* standard. This is especially so given the absolutely irreproachable conduct of state authorities toward petitioner. So careful was Officer Gresham, for example, to protect petitioner's rights that he took it upon himself to interrupt petitioner when it appeared that the latter —who was asking *Gresham* about the case, not vice versa

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[6] Petitioner tries to circumvent the distinction between the attachment of a right and the assertion or invocation of same. He does this by using words with different meanings interchangeably. *See, e.g.*, Brief at 11 (right to counsel was "invoked" by virtue of charges having been filed) and Brief at 33 (return of the indictment resulted in "automatic invocation" of right to counsel).

[7] Indeed, the dissent in *Jackson* points out that logically, the defendant's request for counsel in that case is not merely an "extremely important fact" for the Court, but—in light of its holding —"the *only* fact that counts." *Id.*, 475 U.S. at —, 106 S.Ct. at 1414 (emphasis in original).

[8] Advising a defendant of his indictment and of his *Miranda* rights has been held sufficient for a valid waiver of the Sixth Amendment right to counsel in *United States v. Payton*, 615 F.2d 922, 924-925 (1st Cir.), *cert. denied*, 446 U.S. 969, 100 S.Ct. 2950 (1980).

—might begin to incriminate himself. *People v. Patterson*, 116 Ill.2d at ——, 507 N.E.2d at 845.

Clearly, before this Court could endorse petitioner's attempt to transform his explicit, repeated waivers of the right to counsel into a denial of that right, it would have to do more than just extend its reasoning in *Michigan v. Jackson*, *supra*; it would have to overrule that case outright, and abandon altogether its traditional understanding of the *Zerbst* standard for a valid waiver of the right to counsel.

B. The Argument That The Miranda Warnings Are An Insufficient Basis For Waiving The Sixth Amendment Right To Counsel Stems From An Unwarranted Hostility To Confessions *Per Se*.

As has just been demonstrated, the facts of the instant case suggest no logical reason why the *Miranda* warnings should be deemed inadequate for a valid waiver of the Sixth Amendment right to counsel with respect to confessions. Thus, the true premise of petitioner's argument is to be found elsewhere—specifically, in an ideological antipathy to confessions in general. *See, e.g.*, petitioner's reference to the alleged need of an accused to be protected from a "misguided willingness to confess" (Brief at 21).

In some jurisdictions, this hostility manifests itself in requirements that state authorities—police, prosecutors, or even "neutral" magistrates—not only *inform* an indicted defendant of his *Miranda* rights, but in effect *induce* him to assert them by giving him additional warnings that would unabashedly "load the deck" in favor of his requesting counsel. *See, e.g., United States v. Mohabir*, 624 F.2d 1140, 1151-1153 (2d Cir. 1980) (defendant entitled to "explanation of the content and significance" of the right to counsel) and cases collected therein.

Other jurisdictions, disturbed by the fact that some indicted defendants will choose to waive their right to

counsel despite being informed of or even urged to assert it, have gone so far as to prohibit that choice outright. *See, e.g., People v. Settles*, 46 N.Y. 2d 154 (1978) (uncounseled waiver of indicted defendant's right to counsel held invalid under New York Constitution).

The above approaches to right-to-counsel issues reflect a fundamental and constitutionally insupportable opposition to confessions *per se*, regardless of their voluntariness. Such opposition is leading, gradually but inexorably, to a wholesale repudiation of this Court's traditional view of confessions as "inherently desirable" [*United States v. Washington*, 431 U.S. 181, ——, 97 S.Ct. 1814, 1818 (1977) (Burger, C.J.); *see also Moran v. Burbine*, *supra*, 475 U.S. at ——, 106 S.Ct. at 1144 (recognizing society's "legitimate and substantial interest in securing admissions of guilt"). The unhistorical notion that there is something improper about using even voluntary confessions as evidence has resulted in a shift of analytical focus from the mindset of the accused to the "legitimacy" of the purpose to be served by police questioning. Thus, the admissibility of an uncounseled confession preceded by *Miranda* warnings is held to turn not on traditional voluntariness factors (*e.g.*, defendant's age, intelligence, criminal record, custodial environment) but on a distinction utterly irrelevant to voluntariness: namely, a distinction between pre-indictment questioning for the purpose of solving a crime, and post-indictment questioning, which "can only be 'for the purpose of buttressing . . . a prima facie case'" [*United States v. Mohabir*, *supra*, 624 F.2d at 1148 (quoting *People v. Settles*, *supra*, 46 N.Y. 2d at 163 (1978)], the latter purpose being deemed somehow objectionable.[9]

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[9] Petitioner makes much of this distinction in support of his claim that, in the post-indictment context, an accused should be advised of the "seriousness" of his situation and of his "heightened" need for counsel (Brief at 20). However, as this Court has recognized, the purpose of the *Miranda* warnings themselves is to make the

This type of analysis completely discounts society's incontestably legitimate interest in seeing that those who commit crimes are not merely apprehended and charged, but convicted, *i.e.*, "brought to justice" in the sense of being held to full account for their actions. *See Moran v. Burbine*, *supra*, 475 U.S. at ——, 106 S.Ct. at 1144 ("Admissions of guilt are . . . essential to society's compelling interest in finding, convicting, and punishing those who violate the law"). If this interest is furthered by the voluntary confession of a defendant who has chosen to make an uncounseled statement after being given full *Miranda* warnings, that confession should be admissible, regardless of whether it was made before or after indictment, and regardless of whether it establishes or "merely" buttresses a *prima facie* case. An otherwise voluntary confession cannot, in accordance with two centuries of constitutional interpretation and a fair balancing of the interests of society with those of criminal defendants, be rendered inadmissible simply because it might improve the government's prospects for conviction. After all, the Sixth Amendment was never intended "to protect a suspect from the consequences of his own candor." *Moran v. Burbine*, *supra*, 475 U.S. at ——, 106 S.Ct. at 1146.

II. THE SIXTH AMENDMENT DOES NOT MANDATE "SUPER" *MIRANDA* WARNINGS SIMPLY BECAUSE DEFENDANTS MIGHT FIND THEM "USEFUL."

The argument that traditional *Miranda* warnings are insufficient for purposes of waiving the Sixth Amendment right to counsel savors of the due process claim rejected by this Court in *United States v. Washington*, *supra*, to the effect that it was fundamentally unfair to

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accused "more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Miranda v. Arizona*, *supra*, 384 U.S. at 469, 86 S.Ct. at 1625.

elicit incriminating testimony from a Grand Jury witness without first informing him that he was a potential defendant. Specifically, the defendant in that case claimed that he should have been told of his target status, because this information would have better enabled him to decide whether to invoke his Fifth Amendment privilege against compulsory self-incrimination. Noting that the defendant had been told that he had the right to remain silent and that any statements he made could be used to convict him of a crime, this Court found it

> inconceivable that such a warning would fail to alert him to his right to refuse to answer any question which might incriminate him . . . . To suggest otherwise is to ignore the record and reality. Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled . . . . [W]e do not understand what constitutional disadvantage a failure to give potential defendant warnings could possibly inflict on a Grand Jury witness, whether or not he has received other warnings.

United States v. Washington, 431 U.S. at ——, 97 S.Ct. at 1819, 1820. Surely it is equally inconceivable that a defendant who is specifically told, as part of his *Miranda* warnings, that he has a right to counsel is nevertheless unaware of his right to counsel. Furthermore, where—as here—a defendant is also told not only that he has been indicted, but that the indictment is for murder, it cannot seriously be claimed that the failure to give him additional warnings about the consequences of a decision to forgo counsel rendered that decision involuntary, unknowing, and unintelligent.

As this Court recognized in *Oregon v. Elstad*, 470 U.S. 298, —— 105 S.Ct. 1285, 1297 (1985), it has "never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." In *Elstad*, this Court held that a suspect who had

given an unwarned but uncoerced statement could, after receiving *Miranda* warnings, validly waive his rights and make an admissible second statement. In so holding, this Court specifically rejected the defendant's claim that his *Miranda* warnings should have been supplemented with a warning that his first statement could not be used against him. This Court found such an additional warning "neither practicable nor constitutionally necessary," inasmuch as "The standard *Miranda* warnings explicitly inform the suspect of his right to consult a lawyer before speaking" (*id.*). *See also California v. Beheler*, 463 U.S. 1121, 1125, n. 3, 103 S.Ct. 3517, 3520 n. 3 (1983) (Court declined to hold defendant's participation in a non-custodial interview with police involuntary simply because he had been unaware of the potential consequences of his statements); *McMann v. Richardson*, 397 U.S. 759, 769, 90 S.Ct. 1441, 1448 (1970) (Court declined to hold defendant's guilty plea involuntary simply because he had been unaware that a prior coerced confession would have been inadmissible).

In *Moran v. Burbine*, *supra*, this Court relied on *Elstad*, *supra*, in rejecting yet another "lack of information" claim—indeed, one that was surely weightier than the claim involved here. The issue in *Burbine* was whether the custodial interrogation of an uncharged murder suspect violated the Fifth and Sixth Amendments where the police had failed to tell him that his sister had retained counsel for him and that counsel had called on his behalf. While acknowledging that "the additional information would have been useful" to the defendant and might even "have affected his decision to confess," this Court made it clear that such "usefulness" is not the measure of what the Constitution demands: "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his

rights." *Moran v. Burbine*, 475 U.S. at ——, 106 S.Ct. at 1142.[10]

Clearly, the reasoning behind this Court's refusal to hold that "the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case" (*Oregon v. Elstad*, *supra*, 470 U.S. at ——, 105 S.Ct. at 1297-1298) applies with equal force to waivers of the Sixth Amendment right to counsel with respect to confessions, where—as here—the waiver is preceded by full *Miranda* warnings as well as by the information that the defendant has been indicted for a particular crime.

A. A Requirement That Police, Prosecutors, Or "Neutral" Magistrates Give Advice In Addition To *Miranda* Warnings Would Undermine Their Distinctive Roles In The Criminal Justice System.

Once state authorities have explicitly told a defendant of his right to counsel in the *Miranda* warnings, any trial advantage he might gain from additional warnings as to "the seriousness of his situation" if he should answer questions in the absence of counsel (*United States v. Mohabir*, *supra*, 624 F.2d at 1153), or from warnings that indicted defendants "customarily" speak with lawyers before speaking with state authorities [*United States v. Callabrass*, 458 F.Supp. 964, 967 (S.D.N.Y. 1978) (Leval, J.)] could only come at the expense of what has traditionally been thought to be the proper functions of police, prosecutors, and "neutral" magistrates, respectively, in our criminal justice system. That system is an ongoing demonstration of the fact that truth is best determined and justice is best served by allowing police-

[10] Thus, petitioner is plainly wrong when he claims that, for a valid waiver, this Court requires a showing that "the accused is *fully aware* of the right to be lost and chooses with *complete knowledge* of the facts to forgo reliance on it" (Brief at 8) (emphasis supplied).

men to be policemen (not "pinch-hitters" for defense counsel—*see Oregon v. Elstad*, *supra*, 470 U.S. at ——, 105 S.Ct. at 1297), prosecutors to be prosecutors [*see* ABA Code of Professional Responsibility, DR 7-104(A)(2)], and "neutral" magistrates to be, in fact, "neutral" (*i.e.*, not advocates for the defendant anymore than they are advocates for the government). Since the purpose of the additional warnings is not merely to inform but, indeed, to advocate a particular course of action, the mandating of such warnings would plainly compromise the integrity of the roles performed by law enforcement and the judiciary in the criminal justice system.

B. Additional Warnings Are Unnecessary Inasmuch As Petitioner Does Not Even Claim, Let Alone Prove, That Police Routinely Deny Indicted Defendants Their Sixth Amendment Right To Counsel.

There is another equally significant reason why the *Miranda* warnings should be deemed sufficient for a valid post-indictment waiver of the right to counsel with respect to confessions. The fact is that, in contrast to the Fifth Amendment context—where the *Miranda* warnings were developed in response to charges of widespread constitutional violations during custodial interrogations—there has been no showing that police commonly deny indicted defendants their Sixth Amendment right to counsel. *See Miranda v. Arizona*, *supra*, 384 U.S. at 445-448, 86 S.Ct. at 1612-1619; *see also Michigan v. Jackson*, 475 U.S. at ——, 106 S.Ct. at 1413 (Rehnquist, J., dissenting). Indeed, as previously discussed, the record in the instant case reveals a scrupulous concern by state authorities for petitioner's rights (*see* Point I, *supra* at 5-6).

Thus, whatever warnings this Court might deem necessary for waiving the right to counsel in other post-indictment contexts, the *Miranda* warnings should be held sufficient for waiving that right with respect to post-indictment statements. To hold otherwise would be to

ignore the fact that, regardless of the post-indictment context of this case, the only right implicating the assistance of counsel on the facts presented here is the right against compulsory self-incrimination—the very right that the *Miranda* warnings were designed to protect.

Petitioner would have this Court reduce right-to-counsel analysis to a theoretical abstraction, utterly without intellectual coherence or rational applicability to the real-life situations it is meant to govern. Surely this Court should not countenance a rule that would have the anomalous effect of transforming the protection of the right to counsel under one Amendment into a simultaneous violation of the identical right under another Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Illinois Supreme Court must be affirmed.

Respectfully submitted,

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